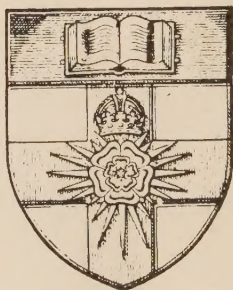


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Lords Justices of Appeal.

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C O R R I G E N D A .

Page 217, line 13, *for* "appellant," *read* "respondent."

„ 219, line 6, *for* "appellant," *read* "respondent."

„ 468, line 11, *for* "O' Connor, K.C.," *read* "Samuels, K.C.," and
for "the respondents" *read* "Daniel L' Estrate,
and O' Connor, K.C., and Redmond Carroll, for
Anne and Sarah L' Estrate."

„ 514, line 11 (names of counsel), *for* "T." *read* "J.," and, line 12,
for "J." *read* "H."

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1902.

IN RE AIKEN; EX PARTE SHANNON.

(1901. No. 737.)

M. R.
1901.

Nov. 4.

Solicitor and client—Fee-farm grant—Printed form, Scale charge—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, 1884, Schedule I., Part 2.

A solicitor prepared a series of fee-farm grants, following a printed form previously approved by the grantee, and annexed to the agreement for the grants, adding a recital of the grantor's title, filling in the names of the parties, parcels, rent, &c., and adding a map to each grant:—

Held, that he was entitled for each conveyance to the remuneration for preparing, settling, and completing conveyances, provided by the scale of charges in Schedule I., Part 2, of the General Order, 1884, under the Solicitors' Remuneration Act, 1881.

SUMMONS. This was an application on behalf of William Shannon to review the taxation by the Taxing Master of a bill of costs furnished by Robert J. Aiken, solicitor, to William

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1901.

In re
AIKEN;
Ex parte
SHANNON.

Shannon, in respect of the preparation of seven fee-farm grants of seven plots of building ground in Strand-road, in the city of Londonderry, from one William M'Learn to William Shannon.

These grants were prepared under an agreement previously signed by the grantee. This agreement was in a printed form, previously supplied and approved by the grantor, and used by him on his estate.

After its execution it was arranged that instead of one grant there should be seven grants of parts of the premises comprised in the agreement, at certain apportioned rents agreed on.

The material clauses of the printed agreement were as follows:—

“3. The said grant so to be granted is to contain all such covenants, clauses, and provisions as are contained in the draft grant already prepared, which has been submitted to, and approved of by, the said grantee, and is annexed hereto, and is to have an approved map of the premises endorsed thereon.

“4. The title of the said grantor to the said piece of land and premises, or his right to grant the same, is not to be required to be produced, or to be inquired into or objected to, and the grantor is not to be called upon to hand over any documents of title.

“6. The said grant and a counterpart thereof is to be prepared by the solicitor of the said grantee, and the said grantee is to pay the costs of and attending the preparation, execution, and registration of the said grant and counterpart, with such approved map thereon, and such counterpart is to be handed over to the said grantor free of expense.

“7. The said grantee shall not be called upon to pay any approval fee to the solicitor of the grantor.”

A map was endorsed on the agreement, showing the dimensions and boundaries of piece of ground agreed to be granted, and a draft fee-farm grant was printed in the fold of the agreement and contained the usual covenants, and a covenant to build a house approved of by the grantor within a year from the date of the agreement. Blanks were left in it for the date, names of parties, parcels, amount of rent, &c.

After the agreement was signed by the grantee, he instructed Mr. Robert J. Aiken, solicitor, to prepare the separate grants of

each piece of ground, pursuant to the above arrangement. Mr. Aiken first drafted one grant, which was in the form annexed to the agreement, with the addition of a recital of the grantor's title, and then drafted the description of the premises to be inserted in each of the grants, and the rent payable, &c. He also added a map on each grant. The original and counterpart grants were engrossed in his office; the drafts and engrossments were produced in Court. He drafted the memorials to each of the grants, and they were engrossed in his office, and registered in the Registry of Deeds Office in the ordinary way.

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The bill of costs furnished by Mr. Aiken to Mr. Shannon for preparing the grants was made out according to the scale provided by Schedule I., Part 2, of the General Order of 1884, under the Solicitors' Remuneration Act, 1881. The charges in the bill were as follows:—

“To fee, under Solicitors' Remuneration Act, to cover costs of instructions, correspondence, attendances, and perusing title, directing searches, and drawing and engrossing original and counterpart of fee-farm grant, M'Learn to You (Rent, £12), .			£7	0	0
Fee on registering grant, ...			2	0	0
Like fee on preparing grant, M'Learn to You (Rent, £12), ...			7	0	0
Fee on registering grant, ...			2	0	0

Then followed a similar charge for each of the other five fee-farm grants, and a like fee for registration, the charge varying with the rent, as provided by the scale fee; the total of these charges amounted to £65.

It was objected before the Taxing Master that the case did not come within Schedule I., Part 2. The Taxing Master over-ruled the objection.

Osborne, in support of the summons:—

In order to entitle the solicitor to charge according to Schedule I., Part 2, he must have substantially done the work specified in the schedule, viz.:—“Preparing, settling, and completing, conveyance.” Here all he did was to copy out the printed form,

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SHANNON.

which was to be used according to clause 3 of the agreement, put in the names of the parties and the parcels and engross it. *In Re Hickley & Steward* (1) is in point. There it was held that the solicitor had not substantially done all the work of preparing, settling, and completing a lease, because the lease was already prepared and set out in the schedule to the agreements. That case was followed in *Wellby v. Hill* (2), where it was held that a solicitor was not entitled to the scale charges, when he only settled a lease in a prescribed form, filling in the names of the parties, and parcels and a plan.

Even if he is entitled to the scale fee for the first conveyance, he is not entitled to make a similar charge for each of the others.

Matheson, K.C., for the solicitor:—

In the cases cited, the solicitor whose charges were in question, had prepared a form of lease before the Solicitors' Remuneration Act; here the solicitor had nothing to do with the preparation of the draft; he substantially did the work specified in the schedule, as he prepared, settled, and completed the conveyances; the drafts are here in Court and show what he did. There is no reason why he should not be paid for all the conveyances on the same scale.

THE MASTER OF THE ROLLS:—

I have often forced the scale fee upon solicitors against their wish, when the remuneration allowed by it was meagre; this, however, is a case in which the amount allowed by the scale, if it applies, will more than remunerate the solicitor. If he is entitled to it, he must get it, although it may be more than I might have allowed on a *quantum meruit*, apart from the statute. It is plain that the parties had the scale or some other standard fee in mind from the commencement of the transaction. Mr. Shannon in his affidavit admits that Mr. Aiken had instructions from him to take out seven separate grants. He says that he desired to have an agreement as to the costs of these grants, but that Mr. Aiken said that it was unnecessary, and that on account

(1) 33 W. R. 320.

(2) [1895] 1 Ch. 524.

of the nature of the transaction he would not charge him the full costs, but would make a very substantial reduction. This cannot mean a reduction from a *quantum meruit*; it must refer to some scale by which the costs were to be regulated. It is said that the solicitor was relieved of any difficulty in the matter, as the parties, viz. M'Learn the grantor, and Shannon the grantee, had provided by the agreement between them that the grants were to be in a stereotyped form which was annexed to the agreement. Suppose instead of annexing a form of grant to the agreement the parties had agreed to use a form to be found in an Irish conveyancing book, it would have been said that the solicitor had only to turn to the book and copy out the form. That would be the same thing as was done here. But that was not all; the parcels had to be inserted and a map of the premises had to be made and endorsed on the grant; the preparation of a map to be put upon a conveyance requires care and caution and involves responsibility.

On the whole, I am of opinion that, though the scale gives the solicitor in this case a liberal remuneration, the case comes within the very words of the scale "preparing, settling, and completing conveyance." No exception is made in the Order for an easy conveyance, nor for a conveyance in a form already prepared. Taking one case with another, the rough with the smooth, the scale fee will be found reasonable on the whole. In the cases cited by Mr. Osborne the form of lease had been prepared by the lessor's solicitors before the General Order under the Solicitors' Remuneration Act, 1881, came into operation, and they do not apply here. Mr. Aiken had nothing to do with the preparation of the form in the present case.

I must therefore dismiss the summons to review the taxation of the Master.

Solicitors: *Hamilton & Boyton*; *R. J. Aiken*.

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1901.

In re
AIKEN;
Ex parte
SHANNON.

W. L.

V.-C.
1901.

IN RE NAVAN RURAL DISTRICT COUNCIL; EX PARTE
FITZHERBERT.

Nov. 11.

(1901. No. 861.)

Lands Clauses Acts—Payment out of Court—Tenant for life—Small amount.

A sum of £30, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Acts, paid out to a tenant for life without any undertaking by him to expend the same in improvements.

SUMMONS by Richard Ruxton Fitzherbert for payment out of Court to him of the sum of £30 cash standing to the credit of the matter, he undertaking to apply the same in permanent improvements on the Black Castle Estates, settled by an indenture dated the 8th December, 1897, or for the investment of the said sum and the payment to him of the dividends during his life.

The said estates were held in fee, subject to a rent of £400 (Irish) per annum, and by the said indenture they were, subject to the said rent and to certain incumbrances, limited, with other property, to uses for securing during the life of the applicant a certain rentcharge, and subject thereto to the use of the applicant for life with remainders over.

The Navan Rural District Council, as Sanitary Authority, acquired, under the provisions of the Labourers (Ireland) Acts, a small portion of the said estates, and they lodged the purchase money thereof, amounting to £30, in Court.

An affidavit of the applicant stated that he was desirous either that the said sum of £30 should be paid out to him for the purpose of effecting some permanent improvement on the said Black Castle Estates, which he thereby undertook to effect; or that it might be invested and the dividends paid to him during his life.

The net income of the estates was considerably more than sufficient to pay the rentcharge and interest on incumbrances.

The next tenant for life and certain persons entitled to rent-charges under the said indenture and a prior settlement had signed consents to the payment.

V.-C.
1901.

In re
NAVAN
R. D. C.
Ex parte
FITZHERBERT

Macrory, in support of the application.

THE VICE-CHANCELLOR made an order for payment out to the applicant without requiring any undertaking; costs to be paid by the District Council.

Solicitors for the applicant: *S. S. & E. Reeves & Sons.*

Solicitor for the District Council: *Fottrell.*

D. M'C. M.

MANIFOLD v. JOHNSTON.

M. R.
1901.

Vendor and purchaser—Particulars—Conditions of sale—Indemnity against rent—Misleading condition—Sale under the Court—Constructive notice—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78). March 18.

Certain premises, described as lot 2, were sold by public auction, under the direction of the Court. The particulars stated that lot 2 was held, with other premises, under lease of 1877, for a term of years, subject to rent, and further stated that the said lot 2 was sold "subject to the said rent, but is indemnified therefrom by an indenture, dated 16th August, 1881, whereby the said lot was assigned to A. J."

The 12th condition of sale was as follows:—"Lot 2 was assigned by deed, dated 16th August, 1881, indemnified against the rent reserved by the said lease (of 1877), as in said deed mentioned, and the purchaser shall not require any further or other indemnity in respect of the same, and shall not require any information as to the person or persons, or premises liable to the said rent, or bound by the said indemnity." The indenture of assignment of 1881 assigned lot 2 to A. J. "Indemnified from the rent, but subject to the covenants by the lessee and the conditions in the said lease."

M. was declared the purchaser of lot 2. At the time of bidding he believed that the other premises demised by the lease of 1877 were bound to indemnify lot 2 against the rent reserved by the lease.

The purchaser applied to be discharged from his contract on the ground that the provision as to indemnity contained in the deed of 1881 did not give

M. R. him any such real or adequate indemnity against the rent as he was entitled to
1901. under his contract:—

MANIFOLD *Held*, that there was not an indemnity within the contract, and that the
v. condition of sale was one which, taken in connexion with the particulars,
JOHNSTON. rendered the information given by the document insufficient and misleading,
and that therefore the purchaser should be discharged from his contract.

SUMMONS under the Vendor and Purchaser Act, 1874.

Pursuant to an order of the Master of the Rolls, certain premises described as lot 2 were sold by public auction. The particulars stated that lot 2 consisted of premises situate at Palmerston-road, on which plot the houses known as Nos. 80, 81, 82, 83, and 84 Palmerston-road stood, and were held (with other premises) under a lease dated 17th January, 1877, for 800 years, subject to a yearly rent of £50 12s. 6d. It was stated in the particulars that “the said lot is sold subject to the said rent, but is indemnified therefrom by an indenture dated 16th August, 1881, whereby the said lot was assigned to Andrew E. Johnston.” The indemnity referred to was contained in the *habendum* of the indenture of 16th August, 1881, and was in the following terms:—“Indemnified from the rent, but subject to the covenants by the lessee and the conditions in the said lease.”

Lot 2 was purchased at the sale by auction by Marcus Tertius Moses for £710.

The 12th condition of sale was as follows:—“Lot 2 was assigned to Andrew E. Johnston by deed dated 16th August, 1881, indemnified against the rent reserved by the said lease (of 17th January, 1877), as in said deed mentioned, and the purchaser shall be satisfied with such indemnity, and shall not require any further or other indemnity in respect of the same, and shall not require any information as to the person or persons or premises liable to the said rent or bound by the said indemnity.”

Before the sale the purchaser made inquiry at the offices of the solicitors for the vendors for particulars of the other premises comprised in the lease of 17th January, 1877, and he was informed that they consisted of Nos. 75 to 79, Palmerston-road. Particulars of the rental of these premises were supplied to him. The purchaser at that time supposed that these premises were bound to indemnify lot 2 against the rent reserved by the lease of 1877.

[illegible]

Harriet Wilson, in the Greenland:

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M. R. At most there was a misrepresentation of law and not of fact,
 1901. and the vendor is not bound by it: *Kendall v. Hill* (1).
 MANIFOLD [THE MASTER OF THE ROLLS referred to *Cooper v. Phibbs* (2).]
 v. JOHNSTON. The construction of the deed of 1881 in this case is a question
 of law. *Hatton v. Waddy* (3) really decides the present case on
 the question as to what the indemnity in the deed of 1881
 amounted to. On the construction of that deed the premises,
 which are not now being sold, are liable to indemnify lot 2 in
 the event of these last premises being distrained or otherwise
 made liable for the rent. At any rate, there is an indemnity of
 some kind—a personal indemnity—provided, and there was
 consequently no misrepresentation.

Donaldson, for the plaintiff, a mortgagee:—

There has been no misrepresentation, and the purchaser must
 be held to his contract. The condition in question is an accurate
 statement as to what the indemnity was. The purchaser gets all
 he is entitled to get under the contract. *Hatton v. Waddy* (3) is
 conclusive as to the meaning to be attributed to the proviso of
 indemnity in the deed of 1881. On the question of notice, the
 purchaser knew that the extent of the indemnity could only be
 ascertained by looking at the deed of 1881 itself, and had no
 right to rely on any statement that the deed he could inspect,
 and ought to have inspected, did contain something it did not
 in fact contain: *Patman v. Harland* (4).

THE MASTER OF THE ROLLS:—

I am of opinion that Mr. Moses cannot be held to this bargain.
 There is no suggestion of bad faith in the matter; but the case
 is one in which he has not got what he was entitled to under the
 contract.

In the particulars of lot 2, of which Mr. Moses was declared
 the purchaser, I read this: "The said lot is sold subject to the
 said rent, but is indemnified therefrom by an indenture dated
 16th August, 1881, whereby the said lot was assigned to Andrew

(1) 6 Jur. (N. S.) 968.

(3) 2 Jon. 541.

(2) L. R. 2 H. L. 149.

(4) 17 Ch. D. 353.

E. Johnston.” For many purposes, notice of the existence of a document is notice of its contents; but this is not always the case, especially where the contract remains executory; and the first question is, supposing the statement as to lot 2 being indemnified is inaccurate, and that there is no adequate indemnity in the deed of 1881, whether, having regard to the conditions of sale, there was such a misrepresentation as entitles the purchaser to be released; and the question is very much the same as it would be if there was a suit for specific performance. He says that the deed of 1881 does not give him an adequate indemnity, or any real indemnity at all. Is this then a mistake of law or of fact? It is not necessary for me to decide this, but I am of opinion this would be a mistake of fact, even though arising out of a question of law. It has been frequently stated that the construction of a document is a question of law, and not of fact, and so it usually is: but in *Cooper v. Phibbs* (1), to which I referred during the argument, it was held that a question of private title, depending on the construction of a document, may be, and was in that case, one of fact: and when a gentleman says that a particular deed contains an indemnity, that is a matter of fact. I am satisfied that there was good faith on both sides, and I see no reason to doubt the statement of Mr. Moses, that he was and still is willing to carry out the contract if he gets what he is entitled to, and what he believed he was to get.

The condition of sale applicable is as follows:—“The said lot 2 was assigned to the said Andrew E. Johnston by deed, dated 16th August, 1881, indemnified against the rent reserved by the said lease as in said deed mentioned, and the purchaser shall be satisfied with such indemnity, and shall not require any further or other indemnity in respect of the same, and shall not require any information as to the person or persons, or premises, liable to the said rent, or bound by the said indemnity, and shall be satisfied with the production of the last receipt (or a copy thereof) for the last gale of rent payable under the said lease.” That condition purports to tie up the purchaser very

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tightly. But it appears that before the sale, and on the same day, he sent round to Messrs. Geoghegan's office, and asked for particulars of the other premises contained in the lease of 1877 (that is for particulars of what he supposed were the indemnifying premises), and he gets an answer that they consisted of numbers 75 to 79, Palmerston-road, together with particulars of the rent; and he was entitled to get this information, except so far as his right is legally modified by the condition. He is entitled to get a proper legal indemnity. He is offered a statement that the lands sold are indemnified somehow or other. It is said that an indemnity exists in equity, and might be worked out against each of the lots by a Chancery suit. In my opinion that is not an indemnity within the contract. Mr. Oulton argued that there is an indemnity of some kind; and when asked, "Is it a personal indemnity?" he says, "Yes." But when pressed as to whether there is any indemnifying security by charges upon other lands, he says, "It may be so; perhaps there is." But no one can say what is the definite security to which Mr. Moses could resort in the event of his premises being distrained for the whole of the rent. Mr. Oulton relies on *Hatton v. Waddy* (1), decided in the Equity Exchequer, where Chief Baron Joy and Baron Richards held that although the language used in a deed did not contain a distinct statement that certain lands in the hands of the assignor were to be indemnified by the other lands which were being conveyed, yet the intention being clear that an indemnity was intended, the sold lands were bound to indemnify the other premises. The case is not the same as the present. The assignee there covenanted with the assignor, his heirs and assigns, that he would pay the quit-rent of all the premises, both of those thereby sold to him; and of other lands retained in the hands of the assignor, and that he would indemnify the assignor, his heirs, and assigns, and his personal estate from payment thereof. Yet even in that case the Court compelled the defendant to execute a regular and formal deed of indemnity in accordance with the plain intention. In the present case this assignor may have parted

(1) 2 Jon. 541.

with the whole of the reversion of the other premises (said to be the indemnifying lands) before this sale. Some of them may be owned by infants, others by lunatics and so forth.

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The position of the parties is not similar to that in *Hatton v. Waddy* (1), where the equity was worked out as against a volunteer. Therefore, without holding that there was any wilful misrepresentation, the condition is one, which, taken in connexion with the particulars, renders the information, given by the document insufficient and misleading. It would be unjust to compel the purchaser to carry out the contract if this were a case of specific performance, and it would be doubly improper to compel him to do so in the case of a sale under the Court.

Solicitors for the vendor : *Geoghegan & Son.*

Solicitors for the purchaser : *Middleton & Son.*

Solicitor for the plaintiff : *A. Henry.*

R. W. L.

ATTORNEY-GENERAL v. COUNTY COUNCIL OF MAYO AND OTHERS.

M. R.
1901.

April 24.

Public highway—Obstruction—Rule as to inappreciability—Mandatory injunction—County Council—Resolution ultra vires—Malfeasance—Action by Attorney-General on behalf of public.

A County Council cannot legally sanction the erection of a permanent structure not authorised by the necessities of the public service, along or upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction.

When the soil has been taken for county purposes everything between the road fences is *prima facie* part of the public highway.

An obstruction placed upon a county road can only be looked on as inappreciable when the obstruction is temporary in character, or where it is so small in extent that it could not, under any circumstances, impede traffic.

ACTION. The Attorney-General, by his statement of claim, alleged that on or previous to 15th May, 1900, the defendants, Patrick Gavin and Bridget M'Ging, were evicted from certain

M. R. lands at Arderry, in the county of Mayo; that on Sunday, 10th
 1901.
ATTY.-GEN. June, of the same year the defendant, Anthony Waters, with a
v. number of other persons, endeavoured to erect on part of the
MAYO public road leading from Aughagower to Straheen, at Arderry, in
Co. COUNCIL. said county of Mayo, a house or hut for the habitation of the said
 Gavin and M'Ging, and were prevented from doing so by the
 police; that subsequently on 13th June, 1900, a meeting of the
 Mayo County Council was held, at which meeting the following
 resolution was passed, viz.: "That we hereby give Mr. Anthony
 Waters, of Doon, permission to erect a house on the public road
 at Arderry, opposite Patrick Malone's house at Arderry." The
 statement of claim then alleged that the defendant, Conor
 O'Kelly, in violation of his duty as chairman of the meeting,
 received the said resolution, and the Council, without any
 legal authority in that behalf, and contrary to their duty,
 passed the said resolution. Paragraphs 5 and 7 alleged com-
 munication with Anthony Waters in reference to the resolution,
 and paragraph 7 was as follows:—"On Sunday, the 17th June,
 1900, the defendant, Anthony Waters, who claims to be the
 secretary of the Aughagower branch of an association called the
 United Irish League, and the defendants, Grimes and Sheridan,
 both members of the Rural Council of the district, with a number
 of other persons, erected at Arderry aforesaid, on the public road
 leading from Aughagower to Straheen, and between the road
 fences, a wooden building with a corrugated iron roof, which
 occupies a frontage to the road of 24 feet 2 inches, and projects 10
 feet from back to front from the fence of the road, with a water
 channel in front of the building with an average width of 2½ feet.
 Half the road fence at the back of the building is utilised to form
 fireplaces and chimneys for the building, which is divided into two
 dwellings."

The statement of claim then alleged that the whole of the
 building was upon the public road, which was maintained as a
 public highway at the expense of the county of Mayo, and that
 the defendants, Waters, Grimes and Sheridan, claimed that they
 were entitled to erect the building upon the road under the resolu-
 tion of the Mayo County Council. Paragraph 10 stated that on
 the completion of the structure the defendants, Gavin and M'Ging,

went into occupation thereof and had since continued to occupy same.

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The Attorney-General claimed (1) "an injunction to restrain the defendants, their servants and workmen from erecting or keeping erected, or authorizing the erection on the said public road at Arderry, in the said county of Mayo, any house or houses, hut or huts, or other buildings, or from otherwise interfering with the public right of way over and along the said road and every part thereof; (2) an injunction to compel the defendants to remove the houses or huts now erected and being on said road at Arderry as aforesaid."

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By their defence the County Council of Mayo stated that they granted permission by resolution to erect the house, believing they had full power to do so, and that no obstruction or inconvenience or diminution of the public right to the free and unimpeded use of the highway could result from such erection taking place. The defence referred to a report of the County Surveyor, which was as follows:—"The hut has been erected upon a piece of waste ground on the side of the mountain road leading from Aughawower to Straheen National School, and north of the iron bridge over the Ayle. This piece of ground forms a sort of expansion of the road, and the hut is clear of the travelling way. The clear distance between the hut and the opposite fence is 15 feet, and this is practically the clear width of the road itself at a distance about 220 feet further north. In my opinion this hut is no obstruction whatever to public traffic. In any case there is very little traffic on account of its inaccessibility."

The defence stated that no complaint had been made to them by any ratepayer or any person using the way, and denied that any inconvenience arose, and submitted that there was no obstruction in law caused by the erection of the house or hut, and that they should not be called on to remove the same.

Evidence was given by Mr. Vereker, Civil Engineer, that the traffic in the district where the hut or house was erected was very limited, and that there was a considerable expansion on the side of the *via trita* or travelling road at this point, but that the front of the hut had encroached by a couple of feet on what was the travelling way before its erection.

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Evidence was given by Mr. E. K. Dixon, who had occupied the position of County Surveyor for seven years, to the effect that the hut in question was erected clear of the metalled way, and was no physical obstruction to the use of the road by passengers; that during the seven years of his acting as County Surveyor the road had been under contract for the whole time except for two years, when it was managed by him as county property.

Patrick Kearney proved that he had, at the date of the erection of the hut, the contract for the road at that place.

The facts of the erection of the hut and the occupation of the hut by M'Ging and Gavin were proved by police witnesses.

The Solicitor-General (Wright, K.C.) (with him *Campbell, K.C.*, and *Morphy*), for the Attorney-General:—

The public road is only vested in the County Council for the purpose of controlling it and keeping it in order for the public. In this case there has been an interference with the rights of the public, and the Attorney-General, as representing the public, is the proper person to sue, and is on the facts entitled to an injunction. He is not bound to wait until it can be shown that there has been actual injury; it is only necessary to show that there has been an unlawful act diminishing the right of the public: *Regina v. Pratt* (1); *Harrison v. Duke of Rutland* (2); *Collen v. Ellis* (3); *Turner v. Ringwood Highway Board* (4); *Attorney-General v. Cockermouth Local Board* (5); *Attorney-General v. Shrewsbury (Kingsland) Bridge Company* (6); *Attorney-General v. Ely Had-denham and Sutton Railway Company* (7); *Attorney-General v. Barker* (8); 14 & 15 Vict. c. 92; Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), ss. 4, 82.

Clancy and Muldoon, for the defendants, the Mayo County council:—

A mandatory injunction such as is asked for here against these defendants will not be granted where the consequence may

(1) 4 E. & B. 860.

(2) [1893] 1 Q. B. 142, 152, 154.

(3) 32 L. R. Ir. 491.

(4) L. R. 9 Eq. 418.

(5) L. R. 18 Eq. 172.

(6) 21 Ch. D. 752.

(7) L. R. 4 Ch. 194.

(8) 83 L. T. (N. S.) 245.

be that legal proceedings will have to be taken against another by the party against whom the injunction is given: *Queen v. Commissioners of the Port of Southampton* (1). The Attorney-General is not the proper person to take these proceedings: *Attorney-General v. Great Eastern Railway Company* (2); see the observations of James, L.J., at pp. 482, 483. There has been no obstruction in this case. If anything the hut is a nuisance, and the proper remedy of the Crown is by indictment.

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At any rate there has been no material or appreciable obstruction, and the injunction ought to be refused: *Regina v. Lepine* (3); *Cowley v. Newmarket Local Board* (4); *Russell v. Men of Devon* (5); *Regina v. Betts* (6); *Regina v. Russell* (7).

At most the County Council of Mayo have been guilty of an act of non-feasance by reason of their resolution authorizing the erection of this hut, and consequently no injunction against them should be granted. No road authority can be sued for non-feasance: *Dorion v. Les Ecclesiastiques du Seminaire de St. Sulpice de Montreal* (8); *Cowley v. Newmarket Local Board* (4).

O'Mahony, for the defendants Gavin and Mrs. M'Ging:—

We rely on the arguments put forward by counsel for the defendants the County Council. These defendants acted under the authorization of the County Council, believing that they were legally justified in entering into occupation of the hut built for them by the local authority.

[Counsel also referred to *Winterbottom v. Lord Derby* (9); *Benjamin v. Storr* (10); *Attorney-General v. London County Council* (11).]

THE MASTER OF THE ROLLS:—

In this case I have no doubt what my decision must be. However I may sympathize with these poor people who are the

(1) 1 B. & S. 5.

(2) 11 Ch. D. 449.

(3) 15 L. T. (N. S.) 158.

(4) [1892] App. Cas. 345.

(5) 2 T. R. 657.

(6) 16 Ad. & Ell. 1022.

(7) 3 E. & B. 942.

(8) 5 App. Cas. 362.

(9) 16 L. T. R. 771.

(10) L. R. 9 C. P. 400.

(11) [1901] 1 Ch. 781.

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occupants of the hut in question, I have no knowledge whatever of the circumstances under which they were evicted, save that their eviction must have been lawful: and I know nothing about them, and have no concern to inquire, till the 17th or 18th of June last, when they came to this hut. I have already intimated that so far as they are concerned I had no intention of giving a decree with costs against them, because, even supposing that they were able to pay costs, they are obviously persons in humble circumstance (they appeared here), utterly uneducated; and when they found a great local authority, which was to them probably a great deal more than the King's Parliament in Westminster—the County Council—passing a resolution authorizing them to do this thing, and when they found some of the members of this body assisting them in doing it, I do not greatly blame them for falling into the mistake of believing that there was a legal justification for doing it.

But the case is totally different as regards the County Council, and the other defendants who have defended the action. The matter is one of great importance; and holding, as I do, that the Attorney-General is entitled to an injunction, it seems to me that it would have been a dereliction of his duty not to have taken the steps that he has taken in the present action. The case in itself does not appear to be of any great magnitude. It is a case of the obstruction to some extent of a county road on which, in the words of the County Surveyor, there is very little traffic on account of its inaccessibility. But if the County Council of Mayo are entitled to do this thing, the County Council of Galway, and the County Council in every other part of Ireland are also entitled to do it. And what does it amount to? It amounts to a claim that they have the right to sanction the erection of a house at every place that they consider convenient on the public county road, that is, to give away at their discretion portions of the county roads for the purpose of erecting residences thereon: and one has only to look at the map to see that this could be done on a considerable scale, with the result of having roads studded with huts or houses, and in fact converted into streets, to be held rent free, and in fee-simple. In my opinion neither the County Council, nor any other body has any such right as to sanction the erection of a house or any other permanent structure, not authorised by the

necessities of the public service, along or upon a county road. The hut in the present case is a structure 24 feet long, and between 9 and 10 feet wide, projecting from the fence which forms the boundary of the road towards the centre of the road, and narrowing the road to that extent, though not narrowing the metalled part of the way much, if at all. Further than that, there is outside of the hut a watercourse which is beyond all doubt an encroachment upon the road, of between 2 and 3 feet in width.

The first suggestion by Mr. Clancy was that this was a green unused strip on the side of the road, and that not being part of the metalled way, there was not the same law applicable to it as to the part of a public road usually needed for carrying traffic. That is not the law in my opinion. When the soil has been taken for county purposes, everything between the fences is *prima facie* part of the public highway: and it is important that this should be so, as there may be a block or obstruction causing the road to be in such a condition as to necessitate the use of the part at the side. Here it is not disputed that this hut is on the county road. The result, if it were not on part of the highway, would be that the ground it stands on belongs to Lord Sligo, the lord of the soil, who has been referred to by Mr. O'Mahony as having something to do with this case. I have nothing to do with Lord Sligo, nor is there anything in the evidence before me to connect him in any way with what has taken place. But the result of showing that this spot is not part of the highway would be that the building of the hut must inevitably be a trespass on his private property, and if that were so, it would only result in another proceeding against the County Council with another plaintiff. But this is not so. It appears to be part of the county property for the purpose of a public road and not otherwise; and as to this, there can be no better authority than that of the County Surveyor, who says that it forms part of the county road at this place, and that it was included in the roads contracted for for a considerable number of years, except two, when it was not included, and that it was then managed by him as county property. Of course, I need not say that, subject to the public easement, the soil is and remains the property of the lord of the soil, and that anyone using it for a different

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M. R. purpose, as for sporting and the like, would be a trespasser.
1901. Is the erection of this hut then an obstruction? The argument
ATTY.-GEN. presented by counsel was, that if it be an obstruction it is
v. inappreciable, on the ground that the absence of traffic renders it
MAYO unimportant. If this were the test of its being inappreciable, very
Co. COUNCIL. possibly the rule contended for by Mr. Clancy might apply. But in my opinion no rule as to inappreciability applies except where the obstruction is temporary in its character, as where a man empties a load of turf on the wayside and then shortly afterwards comes and takes it away, or where it is so small in extent that it could not under any circumstances impede traffic. But to tell me that a hut intended for human habitation, 24 feet long by 10 broad, supported by posts and constructed of timber and zinc, placed on the King's highway, even though it be not so durable or lasting to face the winds and snows of Mayo as if it were more staunchly built—to say that is not a permanent obstruction is to my mind absurd. I have no hesitation in saying that it is a permanent obstruction, and not a mere temporary and removable obstacle; and though, no doubt, there may be little traffic at the spot where it has been erected, it is on part of the road which no one has any right to take away from the purposes for which it was intended.

The Attorney-General, as representing the public, is the only person who could sue in this case, because this is the King's highway for all his subjects, and they can only sue by their constituted representative. It has not been suggested how an action could be maintained by anyone other than the Attorney-General. Of course in the case of a nuisance, where one of the public sustains especial damage, as, for instance, where a man tumbles into a hole which has been wrongfully made on a high road and breaks his leg, he can bring an action. But in the present case one of the public has no right to sue. The proceedings must be taken by the Attorney-General.

In considering the matter the question occurs as to the motive and object with which the thing was done, and some light is thrown upon the transaction. On the 13th June, 1900, there was a meeting of the Mayo County Council, and it was resolved :—
 “That we hereby give Mr. Anthony Waters of Doon permission

to erect a house on the public road at Arderry, opposite Patrick Malone's house at Arderry." Armed with this authority the thing was done. The Mayo County Councillors who passed the resolution may have been acting *bona fide* in what they did in the sense that they may have believed that they had the right to erect this human habitation on the public road ; but I cannot think that they got this idea of their powers from being successors of the Grand Jury, and so empowered to stop up a public road on the ground of inutility. In this case, on the contrary, this way is a well-defined public road, leading right on to a public bridge. I have been urged not to grant an injunction on the ground that this is merely a case of non-feasance on the part of the County Council. I confess my utter inability to understand what this means. Non-feasance means not doing a thing. If the County Council had done nothing they would not have been sued at all. They are sued because they have passed a resolution which means "we have authority to do this, and we give you authority to erect a house on the public road." This is not a case of non-feasance. It is the plainest case possible of malfeasance—doing a wrong thing ; sanctioning it and directing it to be done. So far as the defendants are concerned, there has been nothing but the eloquence of their counsel to indicate that they have not acted in open defiance of the law ; but I do not assume that this is so. I assume their *bona fides* in the limited sense I have indicated ; and in that they have made this assertion of right openly, and not clandestinely, they are entitled to consideration as compared with the action of some other County or District Councils in cases which have come before me. In my opinion they came to an extremely wrong conclusion. They ought to have taken legal advice on the subject before they entered on the course they have taken of giving away public property, and authorizing the construction of this hut, and encouraging others to incur the expense involved in its erection. They have no such power as they have asserted.

Under the circumstances there must be an injunction against them, and the other defendants, with costs against all except Gavin and Mrs. M'Ging. In reference to a mandatory injunction it was argued that such will not be granted where the result may be to compel a party to take legal proceedings, and *The*

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M. R. *Queen v. Commissioners of the Port of Southampton* (1) was relied on.
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ATTY.-GEN. That was the case of a *mandamus*, and all the Court there said
v. was, "We will not put words into a writ of *mandamus* that
MAYO necessarily mean that any legal proceedings must be taken against
Co. COUNCIL. another."

There must be an injunction against all the defendants. All the defendants are bound to obey the order of the Court. If any one of them should get into the hut and hold possession of it, that would be a disobedience of the order of the Court, and that person, whoever he might be, would have to be committed. If such a thing occurred, and if it were shown that the injunction could not otherwise be enforced, the plaintiff can come to the Court and apply for power at the expense of the County Council, to remove the hut, the continuance of which would be a breach of the injunction.

Solicitor for the Attorney-General: *Sir P. Coll.*

Solicitor for the Mayo County Council: *A. B. Kelly.*

Solicitor for the defendants Gavin and M'Ging: *E. Barry.*

R. W. L.

IN RE STEVENSON'S ESTATE (1).

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Registry Acts—Equitable mortgage—Deposit of title-deeds unaccompanied by writing—Subsequent registered conveyance for value—Antecedent letters leading up to the deposit—Priority—Registry Act, 6 Anne (Ir.), c. 2.

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Nov. 29.

S., who kept his bank account in the Londonderry branch of the Provincial Bank, in the beginning of 1895, was being pressed by the bank manager to give some further security, or to reduce his overdraft. At the time S. was negotiating for the purchase of the P. estate in the county of Westmeath. Several letters were written by S. to the bank manager, in some of which S. stated that as soon as he got the conveyance of the P. estate he would deposit it with the bank. The sale of the P. estate was concluded for £8000, and it was agreed that the entire purchase-money was to be left outstanding on mortgage. The conveyance to S. was executed on the 11th July, 1895, and the mortgage by S. to the vendor T. was executed on the same day. On the 13th July, the town agent of the solicitor for S. deposited the conveyance with the Provincial Bank at their office in Dublin. There was not any memorandum in writing at the date of the deposit, and the deed was sent down to the Londonderry branch of the bank from the Dublin office the same day. In July, 1896, S. executed a deed of mortgage of the P. estate to F. and S. to secure the repayment of £4500, and on being asked by F. and S. for the conveyance to himself, S. stated that it was in the custody of T., the prior mortgagee. The mortgage to F. and S. was duly registered:—

Held (by FitzGibbon and Holmes, L.JJ.; *dissentiente*, Walker, L.J.; reversing the decision of Meredith, J.), that the letters from S. to the bank did not amount to an agreement to create a charge, and did not require to be registered in order to preserve the priority of the bank over the mortgage to F. and S.

APPEAL from the decision of Meredith, J., of the 29th July, 1901, by which he allowed an objection by Robert Joseph Stevenson and James Watts Fullerton, mortgagees of the Portlemon estate, by deed dated the 29th July, 1896, to the claim of the Provincial Bank of Ireland. The bank were returned on the schedule of incumbrances as No. 8 in priority to these two mortgagees by virtue of an equitable mortgage created by deposit of a

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certain title-deed by or on behalf of the owner on the 15th July, 1895. According to the case of the bank there was not any memorandum in writing accompanying the deposit, and so no record of the bank's mortgage appeared on the Registry of Deeds, there being nothing to register. There had been some letters written by Colonel Stevenson to D. B. Stuart, the manager of the branch of the Provincial Bank of Ireland at Londonderry, prior to the deposit of the title-deed; and the trustees claimed priority over the bank on the ground that these letters amounted to an agreement for a mortgage which was capable of registration.

Under the trusts of the settlement executed on his marriage, and dated the 17th September, 1878, and in the events which had happened, Colonel Stevenson was tenant for life of the funds comprised in the settlement, and also of certain other funds bequeathed to the trustees by the will of his father-in-law, William Black. He had borrowed from these trustees, Robert Joseph Stevenson and James Watt Fullerton, a sum of £3500 secured by mortgage, dated the 17th January, 1896, of his life estate in the funds comprised in the settlement, with policies of insurance on his life as collateral security. In March, 1896, Colonel Stevenson proposed to the trustees that they should advance to him a further sum of £4500, which they agreed to do on getting further security in addition to the life interest in the trust funds. He proposed to include in the mortgage his Portlemon estate in the county of Westmeath, subject to a mortgage to Mrs. Treacy, which was returned as No. 7 on the schedule of incumbrances. Colonel Stevenson had purchased the Portlemon estate from Mrs. Treacy in 1895 for £8000, and the purchase-money was left outstanding on mortgage at £4 per cent. The conveyance to Colonel Stevenson was executed on the 11th July, 1895, and on the same day Colonel Stevenson executed the mortgage for the entire purchase-money to Mrs. Treacy. During the negotiations for this loan the trustees had asked Colonel Stevenson for the title-deeds to the Portlemon estate, and were informed by him that the deeds were in Dublin in the possession of the solicitors for Mrs. Treacy, the prior mortgagee.

Colonel Stevenson kept his account at the Londonderry branch of the Provincial Bank of Ireland, and at the commencement of

1895 his account was overdrawn, and he was being pressed by the manager either to make a lodgment, or to give further security. In answer to one of these letters Colonel Stevenson wrote to Stuart on the 26th March, 1895:—

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"I enclose Quin's bill corrected, as advised. Please discount and credit to our account. I am sending our pass-book that it may be posted up. I hope to let you have a further lodgment of £400 or £500 in a few days' time, and when I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you."

On the 18th May, 1895, Colonel Stevenson wrote—

"I have your letter of the 16th inst. So far, sale has not been made of the shares in Mitchell & Co.'s, Belfast, I spoke to you of. I have instructed my broker to realise same as early as possible, and I am pushing my solicitor, and Mr. Wilson, the Dublin solicitor, who has to make title, to complete the deed of the Portlemon estate as quickly as possible. The conveyance to me has been approved of by Mr. D'Alton, who is now making the necessary searches, and I hope will soon be completed for lodgment with you. When I return to Knockbrack on Wednesday next I will look out some additional security, which I will hand you to hold until all is completed to the satisfaction of your directors. I should be very sorry that you would be in any way blamed over my account, and I assure you that all you require is a little patience, and my account will be put on a satisfactory basis."

On the 24th May, 1895, Colonel Stevenson wrote—

"Please place the enclosed £250 to the credit of our account, and hold the enclosed securities with those already in your possession. My solicitor says it will take a month yet to complete searches and perfect deed of Portlemon estate. I am sorry at the delay, and I am doing all in my power to have deed ready for lodgment with you as undertaken."

"Securities enclosed—Life Policy, own life, for £1000; Judgment Search on Stewart Estate held by me, £600; Conveyance Rockbull Cottage, £180."

On the 6th June, 1895, a mortgage was sent to Colonel Stevenson by Stuart, and on the 7th June Colonel Stevenson wrote—

"I have the mortgage sent me for signature, received by me last night. I have read it carefully, but I cannot see my way to sign it. Your solicitor has evidently made a mistake, and supposes my mother,

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Mrs. Barbara Stevenson, to be my wife. I do not desire to give a mortgage, nor do I see any necessity for same. An authority to hold such securities as are deposited with you as collateral security for our overdraft until same be discharged, should meet the case. If, however, in addition to holding the title-deeds of the Portlemon estate, which I hope soon to deposit with you, I can and will give you such form of mortgage as you desire against that property, and the insurance policies on life of Ed. de Blaquiere you hold. I hope to make you a considerable lodgment shortly, as there is money now coming to me from Mr. Black's estate, and I have asked the executors to let me have my dividend for past year out of that property as soon as possible."

On the 11th July, 1895, the conveyance of the Portlemon estate was executed, and on the 15th July, Mr. Lett, the agent in Dublin of Colonel Stevenson's solicitors, deposited the deed with Mr. Tweedy, the solicitor for the Provincial Bank of Ireland in Dublin, for the purpose of giving the bank an equitable mortgage. There was not any memorandum in writing, or other document accompanying the deposit, nor were either Mr. Lett or Mr. Tweedy aware of the correspondence which had passed between Colonel Stevenson and Stuart, although they did know that there were negotiations for an equitable mortgage by deposit of title-deeds. Mr. Tweedy sent the conveyance to the manager of the branch at Londonderry, and on the 13th July, 1895, Colonel Stevenson wrote to Stuart—

"I saw Mr. Tweedy on Thursday, and he asked me to get my solicitor to get the insurance policies on the life of Ed. de Blaquiere vested in myself, that I may instruct him to make the necessary application. Would you please let me have particulars of policies you hold—name of office, number of policy and amount of same—and I will have the matter put in order. The conveyance of Portlemon property was signed on Thursday, and Mr. Lett will have lodged same with Mr. Tweedy before now."

In 1898, Colonel Stevenson proceeded to sell the property to the tenants under the Land Purchase Acts, and on the 23rd April, 1900, the final schedule of incumbrances was filed. In this schedule Colonel Stevenson returned the bank as No. 8 on the schedule on foot of their equitable mortgage; and he returned Robert Joseph Stevenson and James Watt Fullerton as No. 9 upon foot of the mortgage dated the 29th July, 1896.

R. J. Stevenson and J. W. Fullerton filed an objection to this schedule on two grounds:—(1.) That the bank at the time of the deposit of the conveyance had full notice from its contents that the lands were then mortgaged to the said Mrs. Treacy, who was entitled to the custody and possession of the said conveyance, and that the bank were then fully aware that David Wilson Stevenson could, after making said deposit, obtain a further loan upon the security of said lands without disclosing the equitable mortgage to the bank by representing that the said conveyance was in the custody of Mrs. Treacy, the first mortgagee.

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(2.) In the alternative R. J. Stevenson and J. W. Fullerton claimed priority over so much of the sums claimed by the bank to be due to them on foot of their equitable mortgage as were advanced by the bank to Colonel Stevenson after the 31st July, 1896, inasmuch as the deed of mortgage of the 29th July, 1896, was duly registered on the 31st July, 1896, and that the bank must be deemed to have notice of it.

The case was heard by Meredith, J., on the 19th November, and 16th and 17th December, 1900, when the correspondence between the bank manager and Colonel Stevenson was disclosed, and some further evidence was given. In consequence of the production of these letters the argument was adjourned, and on its resumption counsel for R. J. Stevenson and J. W. Fullerton raised the question that the letters which passed between Colonel Stevenson and the manager at Londonderry amounted to an agreement to charge, and required registration in the Registry of Deeds to preserve the priority of the bank.

On the 29th July, 1901, Meredith, J., delivered judgment, and allowed the objection.

MEREDITH, J.:—

This case raises questions of very great difficulty and importance—questions which, having regard to the interests involved, may well be deemed worthy of consideration by another Court. The ultimate point to be decided is whether two rival claimants have been placed by the Examiner in their proper priority on the schedule of incumbrances in this matter. At No. 8 the Provincial Bank are returned as claimants in respect of an equitable mortgage

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by deposit of title-deeds made on the 15th July, 1895, the particulars of which are stated in the proper column of the schedule as follows :—“On date in second column the vendor lodged the title-deeds of the lands in this matter by way of equitable mortgage to secure moneys due by him to the bank. The sum of £4602 14s. 1d. was due for principal on 31st December, 1899.” At No. 9, James Watt Fullerton and Robert Joseph Stevenson are returned as claimants in respect of a mortgage by deed dated 29th July, 1896, registered on the 31st July, 1896, the particulars of their demand being set forth as follows :—“Mortgage of these and other lands to secure £4500 then advanced with interest as therein, and also a sum of £3500 due on foot of a mortgage of other premises, dated 17th January, 1896.”

Now, the affidavits filed on one side and the other deal with a number of matters of more or less importance, and oral evidence has also been adduced with a view to elucidating points which appeared to call for explanation. Having gone carefully through the affidavits and considered the oral evidence, I have satisfied myself that there is no real ground for suspicion or doubt as to the good faith of either of the claimants. I am convinced (and so hold) that both the bank and the claimants at No. 9 are innocent parties. The affidavit of Mr. Robert Joseph Stevenson (which affidavit I permitted to be taken as an objection to the final schedule) sets out shortly the objection of himself and his co-trustee to the priority of the Provincial Bank. The affidavit of the objector deals, first, with a matter which is not now before me, but which may explain the real meaning of the present contest. Perhaps I am not far wrong in thinking that if it had not been for the fact that succession duty at the rate of 10 per cent. was payable to the Crown in respect of the estate, this case would never have been fought out. However this may be, the facts set forth in the affidavit of Mr. Robert Joseph Stevenson (as distinguished from the inferences sought to be drawn therefrom) are not now really in dispute. [His Lordship read the affidavit.] Now I may say at once, that, if there was nothing more in the case than is disclosed by this affidavit, I should be prepared to hold that the objection was unsustainable. The registration of the deed of mortgage did not constitute “notice” to the bank. It is well settled that regis-

tration is not in itself notice, and no other notice was proved. Indeed, it would seem as if the claimants under the deed of 29th July, 1896, when they became aware of the claim of the bank (as they did on the 20th December, 1899), refrained from taking any action. In the affidavit of Mr. J. K. Reid, in paragraph 12, the following statement is made:—"The first time that I, or, to the best of my knowledge and belief, either of my clients, the said Robert Joseph Stevenson and James Watt Fullerton, became aware of the existence of any claim by the Provincial Bank on the said Portlemon estate was on the 20th December, 1899, when we had a conference at the office of the said R. A. Wilson, solicitor for the vendor, who then informed us of the existence of the alleged charge; and at that conference, on going into the facts and figures of the estate as far as they were then known, it was considered that it would be unnecessary for my clients to raise any question as to the charge of the bank, as it was considered they would be amply secured after allowing payment in full of the claim of the bank. Owing to the large sum since discovered to be payable out of the estate for succession duty, the estate is not now sufficient security both for the bank and my clients." The equanimity with which the information as to the existence of the bank's claim was received led me at first to suspect the possibility of knowledge antecedent to the conference, and the fact that the objectors, the mortgagees claiming under the deed of 29th July, 1896, were and are the trustees of the vendor's marriage settlement tended to encourage doubt and suspicion. However (as I have already intimated), I am now satisfied that the objectors are innocent parties. I think it has been made clear that reasonable inquiries were made as to the whereabouts of the conveyance of the 11th July, 1895, and that Mr. Stevenson, Colonel Stevenson's solicitor, represented to the trustees that the title-deeds were in the possession of Mrs. Treacy, the first mortgagee. They made inquiries and were told that the deeds were where they naturally expected they would be; they were satisfied, and reasonably satisfied, with the answer to their inquiries; and they had no knowledge of the bank's claim till the 20th December, 1899.

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The second question raised by the objection—the real question intended to be raised by it—and argued in the first place by Mr.

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Wylie is, that the equity of the bank is inferior to that of the objectors, inasmuch as the bank, when accepting the deposit from the vendor, were aware that he was only a mortgagor and had executed a mortgage to Mrs. Treacy for £8000, and that *prima facie* he had no right to the possession of the conveyance of 11th July, 1895, which ought to have been in the custody of Mrs. Treacy; therefore (the argument thus proceeds), in accepting a mortgage by deposit of the deed of the 11th July, 1895, from Colonel Stevenson, the bank were enabling or assisting him to commit a future fraud by borrowing money from third parties on the security of his equity of redemption, concealing the deposit in favour of the bank, and representing to such third parties that the deeds were in the proper custody, viz. that of Mrs. Treacy. I think that contention cannot succeed. Neither a bank nor an individual is bound to take precautions for the benefit of mankind at large against the possible future fraud of a mortgagor. As Fry, L.J., observes in *Union Bank of London v. Kent* (1), "I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely to be a knave." It seems to me that the act of the bank did not promote or assist fraud or knavery in the least degree. As well might it be argued in the case of a mortgage by deposit from an owner in fee-simple that the equitable mortgagee encouraged, promoted, or assisted fraud by leaving it open to the mortgagor to borrow on the security of his equity of redemption, suppressing the fact of the deposit and representing that his title-deeds were lost or destroyed. The argument goes too far. It goes to the root of all equitable mortgages by mere deposit of title-deeds.

Be it remembered that Mrs. Treacy's priority is not and could not have been questioned here. Her mortgage was registered, and the conveyance set forth on the face of it the facts as to the mortgage. The explanation which Mr. Tweedy, the solicitor to the Provincial Bank, gave of the bank's acceptance from the mortgagor of the deed of conveyance is fair and reasonable. It is clear that no attempt to withhold information as to Mrs. Treacy's mortgage was made by Colonel Stevenson; any such attempt must

have proved useless, for the conveyance (as already indicated) sets out that the purchase-money was secured by a mortgage of even date therewith. It was a case in which Mrs. Treacy might allow the conveyance to remain in the hands of the mortgagor. Her position as first mortgagee was impregnable: the equity of redemption was of value, and the mortgagee by allowing the mortgagor to retain the title-deeds left it open to him to create a valid mortgage by deposit, as it was open to him to convey the equity of redemption by deed. I therefore think that under the circumstances there was no negligence—no misconduct—on the part of the bank in taking, if they did take, an equitable mortgage by deposit without writing, nothing that would justify the Court in refusing to give effect to the decision of the Court of Appeal in *Burke's Estate* (1), if the Registry Acts had in this case (as in *Burke's Case*) no application.

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But I have, after very careful consideration, come to the conclusion that the bank cannot maintain their apparent priority. In the course of the hearing letters between Colonel Stevenson, the vendor, and the manager of the Provincial Bank at Londonderry were disclosed by the bank. The bank desired the Court to have all these important documents, and they voluntarily disclosed them. The question whether, and to what extent, these letters affected the rights of the parties was very fully and ably discussed before me by counsel on each side. I have no doubt that some of the letters came by surprise upon the advisers of the Provincial Bank, and especially upon their able solicitor, Mr. Tweedy. I venture to think that if some of those letters, written before the deposit was made, had been shown to Mr. Tweedy, he would have advised a different course of action. Possibly I am wrong in this; certainly, the bank (notwithstanding the letters) contend most vigorously that no question arises under the Registry Acts, and that *Burke's Estate* (1) is conclusive in their favour. Now, in *Burke's Estate* (1), the deposit was unaccompanied by any memorandum. Is that so here? The first suggestion made in argument was that the word "accompany" involves practical identity of time and occasion, and that a writing cannot be said to "accom-

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pany" a deposit unless the two go, as it were, hand-in-hand. No doubt, in the case of *In re Hamilton* (1), the memorandum was enclosed in the same envelope with the document deposited, and expressions occur frequently in the judgments of learned Judges commenting on *Hamilton's Case* (1) and other cases which appear to indicate that to constitute a "conveyance" within the authorities the letter or memorandum must be written and sent with or immediately before or immediately after the deposit. There is, however, no decision to the effect that if a deposit is made on the basis of a contract or agreement set forth in a letter or series of letters written prior to the deposit, the letter or letters are to be ignored, the bare deposit is alone to be regarded, the Registry Acts have no application, and *Burke's Estate* (2) must prevail. I should be much surprised if any such decision were to be found. Mr. Walker, however, presented a much more powerful argument than this. There must, he urged, be at least a clear and definite agreement to create a charge, otherwise there is no "conveyance"; the letters relied on in the present case are vague and indefinite, abounding in expressions of hope and anticipation, but manifesting no clear intention or agreement to create a charge. This renders it essential to see what the letters actually say, and to consider their meaning and effect. The first letter to which I shall refer is that dated the 26th March, 1895. Colonel Stevenson had not then completed the purchase of the Portlemon estate: he was expecting the completion by conveyance of the purchase agreement entered into on the 10th December, 1894. He had an overdraft, and security was required; he writes:—"I hope to let you have a further lodgment of £400 or £500 in a few days' time, and when I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you." In the next letter to which I refer, dated the 18th May, 1895, he says, ". . . and I am pushing my solicitor and Mr. Wilson, the Dublin solicitor who has to make title to complete the deed of the Portlemon estate, as quickly as possible. The conveyance to me has been approved of by Mr. D'Alton, who is now making the necessary searches, and I hope will soon be completed for lodgment with

(1) 9 Ir. Ch. R. 512.

(2) 9 L. R. Ir. 24.

you. . . .” Then he writes on the 24th May, 1895, “Please place the enclosed £250 to the credit of our account, and hold the enclosed securities with those already in your possession. My solicitor says it will take a month yet to complete searches and perfect deed of conveyance of ‘Portlemon estate.’ I am sorry at the delay, and am doing all in my power to have deed ready for lodgment with you as undertaken.” Now the expression in the letter of the 18th May, 1895: “I hope will soon be completed for lodgment with you” has been criticised; but the correspondence must be read as a whole; and the letter of the 26th March is definite enough—“When I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you.” I hold that the words “I hope will soon be completed for lodgment with you” are meant as a expression of regret that the deed was not already lodged. Again, “I am sorry at the delay, and am doing all in my power to have deed ready for lodgment with you *as undertaken*.” A most important letter is that of the 6th June, 1895, in which Colonel Stevenson says:—“I have the mortgage sent me for signature received by me last night. I have read it carefully, but cannot see my way to sign it. Your solicitor has evidently made a mistake and supposes my mother, Mrs. Barbara Stevenson, to be my wife. I do not desire to give a mortgage, nor do I see any necessity for same. An authority to hold such securities as are deposited with you as collateral security for our overdraft until same be discharged should meet the case. If, however, in addition to holding the title-deeds of the Portlemon estate, which I hope soon to deposit with you, I can and will give you such form of mortgage as you desire against that property and the insurance policies on life of Edward de Blaquiére you hold. I hope to make you a considerable lodgment shortly as there is money now coming to me from Mr. Black’s estate, and I have asked the executors to let me have my dividend for past year out of that property as soon as possible.” The earlier part of that letter refers to a proposed mortgage of property other than the Portlemon property. That letter must be read in connection with the distinct undertaking in the earlier letter, that when the title-deeds of the Portlemon estate were received from his solicitors they would be lodged. The last letter to which I refer is dated

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Appeal. the 13th July, 1895, and contains the following :—"The conveyance of the Portlemon estate property was signed on Thursday, 1901. and Mr. Lett will have lodged same with Mr. Tweedy before now." Now, Mr. Lett was solicitor for Colonel Stevenson, and the actual deposit was made on the 15th July, 1895—two days after that letter was written—by Mr. Lett, as Mr. Tweedy, who was examined here, stated in his evidence. Mr. Tweedy said, "I am solicitor for the Provincial Bank of Ireland. I was such solicitor in June, 1895; I recollect the lodgment which was made with me on the 15th July, 1895, made by Lett, solicitor. He was acting for Colonel Stevenson. On the 11th July, 1895, Colonel Stevenson called as to his account and as to delay in lodgiug deeds with reference to the Portlemon estate, and said that Mr. Lett would lodge the deeds; no written document then. I sent it (the deed) down the same night to the branch manager [he handed in letter of 7th June, 1895, and further correspondence]. Nothing but conveyance from Mrs. Treacy was handed to me; I knew of Mrs. Treacy's mortgage, but, Colonel Stevenson having a large surplus interest, we thought Mrs. Treacy quite entitled to allow Stevenson to borrow." I think so, too: I hold with the Provincial Bank in all respects, save one—The bank contend that their security was created by mere deposit without writing. I hold that the deposit was made by reason of and in fulfilment of an agreement contained in a letter—a series of letters—inseparably connected with the deposit embodying and evidencing the transaction between the parties. Therefore, this case is different from *Burke's Estate* (1), where there was a simple deposit of title-deeds without writing.

I decide this case on its own facts; I believe (and counsel for the bank admits) that I must treat the letters to the branch office of the bank, and the dealings with the Dublin office, as parts of one transaction. Treating them as parts of one transaction, I hold that the bank, while they claimed (in the best possible faith) to have no security beyond a parol deposit, were wrong in this, inasmuch as their agent had documents to evidence the transaction. They are documents which, even if incomplete in some

(1) 7 L. R. Ir. 57; 9 L. R. Ir. 24.

respects, are nevertheless, in my opinion, to be regulated by the provisions of the Registry Act. They constitute a "conveyance" within the true construction of the 5th section of the Irish Registry Act (6 Anne, c. 2), and they bring the case within the principles upon which the cases of *Re Hamilton* (1) and *The Agra Bank v. Barry* (2) were decided; and therefore the bank is not entitled to claim priority as in the case of an equitable mortgage by parol deposit of title-deeds.

Even if the mortgage of 29th July, 1896, had not been registered the judgment of Sullivan, C., in *Lambert's Estate* (3) would have to be considered if I am right in my view as to the effect of the letters. But as the facts stand this present case must stand or fall by the Registry Act—at least, that is my opinion. Of course, a "conveyance" may be comprised in more writings than one (sect. 15 of the Act). Defects of form will not avail the party who seeks to rely upon an unregistered as against a registered conveyance, for, as Lord Chancellor Brady observes (at page 518 of the report) in the case of *In re Hamilton* (1), "here is a writing, and although it is defective in some particulars, that is the fault of the party, and he cannot avail himself of the objection." I hold that this case cannot be taken out of the operation of the 5th section of the Registry Act. But I shall take care to provide by my order that, so far as Colonel Stevenson is concerned, he shall not derive any benefit or advantage as against the bank under or by virtue of the mortgage of 29th July, 1896, or the priority which his trustees have acquired by reason of the registration thereof.

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The Provincial Bank appealed—

Matheson, K.C., and Garrett Walker, for the appellants:—

The security given to the Bank was created by the deposit of the deed, and not by the antecedent correspondence. *Burke's Estate* (4) decided that an equitable mortgage created by deposit

(1) 9 Ir. Ch. R. 512.

(3) 13 L. R. Ir. 234.

(2) I.R. 6 Eq. 128; L.R. 7 H.L. 135.

(4) 9 L. R. Ir. 24.

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of title deeds, without writing, although not registered, is entitled to priority over a subsequently registered deed of mortgage. A prior correspondence, followed by a deposit of title deeds, may amount to an agreement to mortgage, and, if so, must be registered to preserve its priority; but we submit that the letters here do not amount to such an agreement. The words in section 6 of the Registry Act (6 Anne, c. 2) are "all deeds and conveyances"; though an agreement may amount to a deed or conveyance, we submit that these letters do not. That must turn on what was the intention of the parties: were these letters intended *per se* to operate as a charge? In *Reilly v. Garnett* (1) it was held that an agreement which a Court of Equity would enforce by specific performance did not in that case require to be registered. A covenant to settle after-acquired property, which is not *in esse* at the date of the settlement, is incapable of registration: *Cleary v. FitzGerald* (2). See also *Agra Bank v. Barry* (3). That case was decided by the House of Lords on the ground of notice of the unregistered security. No expression of opinion was given as to whether the letters in connexion with the equitable mortgage constituted a contract capable of registration, and requiring registration in order to preserve its priority. In *Credland v. Potter* (4) Lord Cairns defined a conveyance for the purpose of the Registry Acts to be "an instrument which carries from one person to another an interest in land." The test here is—Do these letters amount to an agreement to create a security? That resolves itself into two questions—(1) Do the letters constitute documents capable of registration? and (2), if so, must they be registered, in order to preserve the bank's priority? The letters only express hope or expectation, and each of them was written on a different subject: the letter of the 26th March, 1895, commenced about Quin's bill, and then referred to the pass-book; the letter of 18th May refers to other securities as well as the Portlemon property; the letter of the 24th May enclosed a sum for lodgment, and also related to other securities, and gave a schedule. The letter of the 6th June dealt largely with the deed of mortgage which Stevenson refused to sign, and the letter of the 13th July began about policies of in-

(1) I. R. 7 Eq. 1.

(3) L. R. 7 H. L. 135.

(2) 7 L. R. Ir. 229.

(4) L. R. 10 Ch. 8.

insurance. They were all written *alio intuitu*, and the mortgage of the Portlemon property was only mentioned incidentally. Stevenson's account was overdrawn, and the bank manager at Londonderry was pressing him for a lodgment, or for security. They do not amount to an agreement to charge the land, of which the bank could have obtained specific performance. Moreover, these letters were not contemporaneous with the deposit as in *Re Hamilton* (1), but extended over a period of time some months previous.

A memorandum of agreement for sale of land, which stated that in consideration of £200 then paid by the purchaser the vendor agreed to complete certain buildings on the land, and the purchaser would purchase when completed at £750, making allowance for the £200, is not an "assurance" capable of registration, *Rodger v. Harrison* (2); see also *Sloane's Estate* (3).

Wylie, K.C., and *Osborne*, for the respondents:—

There were no terms between Mr. Lett and Mr. Tweedy at the date of the deposit; it is therefore necessary to look elsewhere for evidence of the contract. The letters amounted to an agreement to mortgage, and must be registered: *Credland v. Potter* (4). "When I receive the title-deed of the Portlemon property, I will have same lodged with you," amounts to an agreement to mortgage. If the writing is defective in some particulars, that is the fault of the parties, and they cannot take advantage of the defect: *Re Hamilton* (1).

It is not necessary that the writing should be contemporaneous with the deposit: *Agra Bank v. Barry* (5); *Copland v. Davies* (6).

It is obvious that the deposit of the deeds here was made in pursuance of the letters, and not in pursuance of any verbal agreement. Although *Burke's Estate* (7) has established that registration affords no protection *per se* against an equity which is not evidenced by some writing capable of registration as a conveyance, it does not follow that every such equity takes priority over

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(1) 9 Ir. Ch. R. 512.

(2) [1893] 1 Q. B. 161, 170.

(3) [1895] 1 I. R. 146, 168.

(4) L. R. 10 Ch. 8.

(5) L. R. 7 H. L. 135, 155.

(6) L. R. 5 H. L. 366, 383.

(7) 9 L. R. Ir. 24.

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FITZ GIBBON, L. J. :—

The question in this case is one of priority between a charge of the Provincial Bank (No. 8 on the Schedule of Incumbrances) by deposit of a title-deed, made on July, 15, 1895, and a mortgage to the trustees of the owner's marriage settlement, by deed dated July 29, 1896, registered on July 31, 1896 (No. 9 on the Schedule). Colonel Stevenson is the owner, subject to the incumbrances. The lands are a reversion in fee in the Portlemon estate in the county of Westmeath, held under a conveyance of July 11, 1895, from Mary Jane Treacy to Colonel Stevenson. The conveyance recites that the estate was purchased for £8000, which was to stand out at 4 per cent. on a mortgage by deed of even date with the conveyance. The amount still remaining due on this mortgage takes priority over both the incumbrances now before us, subject to a question as to the liability of Mrs. Treacy to make good the loss caused by a mistake in a statutory declaration which she made in proof of her title, which resulted in the property becoming unexpectedly chargeable with succession duty at 10 per cent. instead of 1 per cent. This question has not been brought before this Court, and Mrs. Treacy's rights or liabilities are not affected by this appeal. The matter came before Meredith, J., as a Land Judge, and he decided against the bank, and in favour of the trustees, upon grounds which he has rightly described as raising questions of very great difficulty and importance. These questions arose upon the hearing of an objection to the Schedule of Incumbrances by the trustees, who lent £4500 out of the trust funds to the owner upon the security of the mortgage of July 29, 1896, in ignorance of the bank's charge.

The objection, as filed, claimed priority over the bank on two grounds. First, it was said that the bank, at the time of the deposit, had notice from the contents of the conveyance that the lands were mortgaged to Mrs. Treacy, and knew that the owner could, after

(1) 21 L. R. Ir. 283.

(2) 25 L. R. Ir. 284.

making the deposit, obtain a further loan upon the security of the lands, without disclosing the pledge, by representing that the conveyance was in possession of the first mortgagee. This representation was afterwards made by the owner; and it was in effect contended that his trustees, having been thereby defrauded, had a "better equity" than the bank, which had made the fraud possible by taking the pledge. Meredith, J. decided this point against the trustees; and, although the contention was again put forward here, we see no reason to question that decision, nor can I add anything to the reasons in support of it given by Meredith, J.

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Secondly, in the alternative, the trustees claim priority over so much of the bank's claim as consists of advances made by the bank to the owner after the registration of the trustees mortgage on July 29, 1896. This point also Meredith, J. decided against the trustees for reasons entirely satisfactory to us.

The first point failed, because the deposit operated upon whatever estate the owner possessed at the time of the pledge, and his being the owner only of an equity of redemption, disclosed to be so on the face of the deed, could not, of itself, give a "better equity" to a subsequent mortgagee by deed of the same equitable estate.

The second point failed—(i.) because registration is not of itself notice, and the bank had not actual notice of the trustees mortgage until after all the advances now claimed to be secured by the deposit had been made; and (ii.) because the trustees, after they became aware of the deposit, abstained, until after those advances had been made, from giving notice of their mortgage to the bank. This they did deliberately, because they thought the security ample to meet both demands, and apparently they would have been right in this, if the demand for succession duty at 10 per cent. had not afterwards unexpectedly arisen.

The case came on for hearing before Meredith, J. upon these points only, and the questions which have now arisen were raised upon facts and documents disclosed to the trustees for the first time at the hearing. Owing to this circumstance, the evidence is not as full as it might otherwise have been, but we must decide the rights of the parties upon the evidence as it stands, and as the deposit is prior in date to the mortgage, it rests upon the

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There is no evidence of notice, of bad faith, or of negligence, which can affect the priority of either party. The present contention of the trustees is founded upon the Registry Act of Anne. They contend that, upon the facts now disclosed, the incumbrance of the bank was created by a transaction which is a "conveyance" within the meaning and operation of the Registry Act, and therefore that, being unregistered, it is by the Act postponed to their registered mortgage. We are bound by the decision in *Burke's Estate* (1) to hold that if the charge of the bank was created by the deposit of the title-deed without writing, it is a valid incumbrance in equity, outside and unaffected by the Registry Act, and therefore taking priority, in order of its date, over a subsequent mortgage by registered deed of the equitable estate held under the pledged deed. But they contend, and Meredith, J. has held, that certain documents disclosed at the hearing formed part of the transaction which created the charge, and therefore that the charge, though *completed* by the deposit, was not *created* by it alone: therefore that those documents, together with the deposit, constituted a "conveyance" within the meaning and operation of the Registry Act, and are postponed thereby.

In deciding this case I do not question or impugn any authority or principle; and, before considering the facts, I must state, as precisely as I can, the principles which appear to me to be established in favour of the trustees as against the decision in *Burke's Estate* (1).

The general principle of equity is this. Whatever has been contracted to be done in the way of making a "conveyance," or of creating a charge—which is a conveyance *pro tanto*—must be treated in equity as having been done. A contract to convey is in equity a conveyance, and a contract to create a charge is in equity a charge. I assume, without actually deciding it, that a contract to deposit a title-deed, when executed, amounts in equity to a contract to create a charge upon the execution of the deed, and that when it is followed by the deposit made in

performance of the contract, a charge is created, not by the deposit alone, but by the contract to deposit completed—or, to use a Scotch expression, “implemented”—by the act of deposit. In such a case I assume that the transaction of charge consists of the contract *plus* the deposit. If the contract is in writing, I further assume that the transaction, being a contract in writing to create a charge by deposit, accompanied or followed by a deposit in pursuance of the contract, is a “conveyance” within the meaning and operation of the Registry Act, and liable to postponement if not registered.

This seems to me to have been actually decided in *Hamilton's Estate* (1) in this country, and in the *Agra Bank v. Barry* (2) in the House of Lords it was assumed. In both those cases, however, the documents accompanied the deposit, and were in terms contracts to charge the lands: in the *Agra Bank Case* (2) the document was not only capable of registration, but was actually registered subsequently to the incumbrance of which the priority was established by the House of Lords. It is also established by *Hamilton's Case* (1) and by English authority, that if there be a document or documents sufficient in equity when followed by a deposit, or sufficient in themselves without any deposit, to create a charge, the fact that these documents are, from defect of form or for any other reason, “incapable of registration” under the Registry Act will not avail to prevent postponement by the provisions of the Act. It is “the fault of the chargeant,” in such a case, that he has taken a security which he cannot protect by registration, and his own “fault” cannot enable him, at law or in equity, to gain priority over a person who claims under a subsequent registered instrument, without notice of the prior, but imperfect and consequently unregistered, instrument or instruments.

But, in every case, the question must ultimately take the form—Was the earlier transaction a “conveyance” within the meaning and operation of the Registry Act? I hold myself bound by authority to decide that it is such a “conveyance” if, but only if, it is a contract in writing to charge; but that it is not a “conveyance” if it is an equitable

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(1) 9 Ir. Ch. R. 512.

(2) L. R. 7 H. L. 135.

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charge created by the act of deposit alone without writing, as distinguished from a deposit which is, in substance and reality, only the completion or "implementing" of a written contract to make the deposit and thereby to charge the lands.

The documents relied on in the present case are letters written by the owner Colonel Stevenson to Mr. Stuart, the manager of the Londonderry Branch of the Provincial Bank. When a contract has to be "spelled out" of one or more documents, it is often difficult to say whether it is a contract at all, and even more difficult to ascertain its terms. But upon the question of "contract or no contract," if the documents are not so explicit as to make it a question of mere construction, "*intention*" comes in, and the Court must look at the position of the parties, and at all the other circumstances, as well as at the documents; and, before pronouncing them to constitute or to evidence a contract, it must be satisfied that the essentials of every contract are proved, including mutuality, and, where the documents are not under seal, consideration. If this proof fails, the transaction is *nudum pactum*, and it can create no charge, nor can it operate either at law or in equity as any "conveyance." By the light of these principles we must examine the facts of this case.

The parties to the correspondence were Colonel Stevenson, a customer of the Londonderry Branch, and Mr. Stuart, the local manager of the Provincial Bank.

In March, 1895, Colonel Stevenson's account was largely overdrawn. Mr. Stuart's employers, the bank in Dublin, were dissatisfied with the amount of the over-draft, and had blamed Mr. Stuart for having allowed it to go so far. He was pressing for security, or for a reduction of the debt.

On March 26, 1895, Colonel Stevenson sent a lodgment, and wrote: "I hope to let you have a further lodgment of £400 or £500 in a few days time, and when I receive the title-deeds of the Portlemon property from my solicitor, I will have same at once lodged with you." The first part of this sentence contains only an expression of hope as to the money: is the last part necessarily a contract?

On May 18, 1895, he wrote: "I am pushing my solicitor and Mr. D'Alton, the Dublin solicitor who has to make title,

to complete the deed of the Portlemon estate as quickly as possible. The conveyance to me has been approved of by Mr. D'Alton, who is now making the necessary searches, and I hope will soon be completed for lodgment with you. When I return to Knockbrack on Wednesday next I will look out some additional security, which I will hand you to hold until all is completed to the satisfaction of your directors. I should be very sorry that you would be in any way blamed over my account, and assure you that all you require is a little patience, and my account will be put on a satisfactory basis." In all this there can be no binding contract as to anything to be comprised in any "additional security" which the writer might "look out," and the reference to Portlemon is only an expression of "hope deferred."

On May 24, 1895, he sent £250 to the credit of his account, and enclosed a policy, a judgment, and a conveyance of Rockbull Cottage (another property), which he asked Mr. Stuart to hold as securities with those already in his possession. These also related to other property. He added: "My solicitor says it will take a month yet to complete searches and perfect deed of conveyance of Portlemon estate. I am sorry at the delay, and am doing all in my power to have deed ready for lodgment with you, as undertaken." All the references in this letter may be satisfied by the construction that makes the lodgment, and nothing else, the origin and creation of the charge, but the words "as undertaken" are no doubt important. On June 6, 1895, a mortgage of other property to secure his account was sent to him for signature, and on the following day he wrote to Mr. Stuart declining to sign the mortgage, and saying, "I do not desire to give a mortgage, nor do I see any necessity for same. An authority to hold such securities as are deposited with you as collateral security for our overdraft until same be discharged should meet the case. If, however, in addition to holding the title-deeds of the Portlemon estate which I hope soon to deposit with you, I can and will give you such form of mortgage as you desire against that property and the insurance policies you hold. I hope to make you a considerable lodgment shortly." Here again lodgment and not letter-writing is treated as "security." The letter ends with remarks about a "pleasant time" and "lovely weather," which hardly harmonize with a document operating as a "conveyance."

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These four letters are the only documents preceding the deposit. Do they amount to a contract to charge the Portlemon estate? Admitting that they are capable of that construction, I cannot hold that it is their most probable or natural construction.

The writer was trying to reduce or to secure his overdraft from other sources all the time, and he refers to the other securities in terms which indicate no idea that any of them became charged by virtue of the letters, or that the letters contained any contract with respect to them. In one instance he refused to give a mortgage. In other instances he spoke of the deposit as being "the security." In the last letter he describes as a "hope" the deposit of the Portlemon deed, which in the third letter he had spoken of as "undertaken." The letters show that he knew that "the directors" were the parties to be "satisfied," in the interest of Mr. Stuart as well as of himself, and in my judgment the most natural meaning to be put upon the whole correspondence is that it is ephemeral, temporizing, and friendly, not contractual; informing Mr. Stuart of what Colonel Stevenson was doing, and intended to do, but not indicating any consciousness on the part of the writer that he was thereby binding himself by contract, nor leading the reader to put such a definite construction upon it. Evidence is wholly wanting that these letters were understood or accepted by Mr. Stuart as containing any definite, binding, or operative contract; and there is no evidence that they were acted upon as a contract either by him or by the bank.

Furthermore, there is no evidence that any consideration was given upon the faith of them as evidencing a contract. If Mr. Stuart had so regarded them, I should expect to find increased credit given, or forbearance to call in the account referred to in them. But even the pressure to reduce or secure the overdraft was not relaxed. There is no evidence that even the fact that they had been written was communicated to the bank, and the bank's solicitor, Mr. Tweedy, who afterwards got the deposit, never heard of them.

Colonel Stevenson went to Dublin early in July, 1895. The Portlemon conveyance was executed on July 11, 1895, and four days later it was lodged, not with Mr. Stuart, but with

Mr. Tweedy in Dublin, by Mr. Lett, who knew nothing of the letters, and was the town agent of the solicitor for Colonel Stevenson. Colonel Stevenson's solicitor, Mr. William Stevenson of Londonderry, was left in entire ignorance, not only of the correspondence, but of the existence of any charge in favor of the bank. He swears that Colonel Stevenson "never informed or consulted him with reference to same." If he had known of it, he would not have permitted the trustees to lend their money in ignorance of it. If a contract was intended, or understood, to be made or evidenced by these letters, Mr. Stuart's conduct is unintelligible if he did not communicate them to his principals in Dublin. If he did so communicate them, the conduct of the bank and of Mr. Tweedy is unintelligible, except upon the assumption that Mr. Tweedy is telling the truth when he swears that the charge of the bank was created by the deposit, and by it alone.

One letter remains, and it contains Colonel Stevenson's contemporaneous description of the transaction. On July 13, 1895, he wrote to Mr. Stuart: "I saw Mr. Tweedy on Thursday, and he asked me to get my solicitor to get the insurance policies vested in myself that I may instruct him to make the necessary application. Please let me have particulars of policies you hold, and I will have the matter put in order. The conveyance of Portlemon property was signed on Thursday, and Mr. Lett will have lodged same with Mr. Tweedy before now." This letter makes no reference to the fulfilment of any previous contract: its terms, the ignorance of the correspondence on the part of the parties in Dublin who acted on both sides in making the deposit, and the absence of all reference to the previous correspondence, either in Colonel Stevenson's communications with them, or in the letter itself, fortify the conclusion that the bank had no charge, and was ignorant of any contract to create a charge, until the deposit was made, and that the deposit was, in the minds and according to the intention of the parties to it, a charge created by the deposit and by it alone. If so, it was not a "conveyance" within the meaning or operation of the Registry Act; the decision in *Burke's Estate* (1) applies,

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and the bank is entitled to priority as of the date of the deposit. For these reasons, founded entirely on my reading and construction of the facts of the case, I think that the order of Meredith, J., should be discharged, and that the objection of the trustees should be overruled.

The subsequent letters, and the other evidence, prove but too clearly that the trustees have been the innocent victims of the suppression of the bank's charge by Colonel Stevenson. I think that the just order as to costs will be that the bank should have its costs of the objection and of the appeal, to be added, when taxed, to its demand on foot of the deposit; and that the costs of the trustees should fall on Colonel Stevenson. If the estate had been insolvent, I do not see how those costs could be allowed against puisne incumbrancers, but we are informed that there are none, so I think that the costs of the trustees, here and below, when taxed, may be made payable with their demand as mortgagees out of the estate.

WALKER, L.J. :—

There is no difference of opinion between the members of the Court as to the principle on which this case should be decided. There is in fact no legal principle at all involved. The whole question depends on the construction of five letters written by Colonel Stevenson to the manager of the Derry branch of the Provincial Bank, of which he was a customer.

Did those letters taken together, or any one of them, create a security by way of equitable mortgage in the sense in which a Court of Equity understands that term against the Portlemon estate when once the conveyance was executed? or, were they, as was said in the argument, mere talk, the only security contemplated being what would be created, without any antecedent or contemporaneous writing, by the mere deposit of the conveyance?

An equitable mortgage as understood in a Court of Equity may arise in many ways. It arises where without any writing there is a deposit of title-deeds by a debtor with his creditor, for the law then presumes that there was an intention to create a security. It will exist where there is a written memorandum accompanying a deposit evidencing the purport of it or the terms

upon which the deposit is made, and many banks have printed forms to meet such a case; or it may be created by a written memorandum of deposit although no deposit of deeds has been actually made, or it will be created by any agreement in writing to create a charge either immediately, or when the deed to which it refers has been executed: such an agreement appears in *Ex parte Jones* (1). It may be contained in a mere letter, though the party be not in possession of the property and be waiting for the conveyance to be executed. One instance of such a security being created by a letter is the case of *Re Stewart* (2). These are, after all, elementary principles, because I agree that we must find in the written document an intention to create a security, such intention being complete in a case like the present when the conveyance was executed, and therefore we are driven to construe the documents themselves.

I apprehend that no question could have arisen in this case if the letters, or any of them, are equivalent to this:—"In consideration of your allowing my account to remain overdrawn, I undertake as security therefor to lodge with you my title-deeds of the Portlemon estate when I obtain them." Is that their real purport, or could the bank, if the deed had not been lodged when obtained, successfully contend that such was their purport, and enforce in a Court of Equity the creation of a formal security?

Colonel Stevenson was a customer of the Provincial Bank at its Derry branch. Securities were held by that branch against his account, which, in March, 1895, was largely overdrawn. The branches of a bank are for the purpose of the customers of each, and the accounts they keep, quite distinct. Mr. Stuart, the manager, had the charge of Colonel Stevenson's account, and was responsible to the directors for any overdraft exceeding what was safe, or exceeding the value of the securities he held against it. It is unfortunate that we have only one side of the correspondence, but we can pretty well judge of the nature of Mr. Stuart's letters from the replies to them.

The first important letter which we have, of the 26th March, 1895, is evidently written in reply to a complaint of the manager as to the customer's overdraft. Colonel Stevenson writes hoping

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(1) 4 L. J., Bankcy., 59. (2) Referred to in *Burn v. Burn*, 3 Ves. 576.

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1901. when I receive the title-deeds of the Portlemon estate I will have
In re same at once lodged with you." It is consistent with that letter,
STEVENSON'S though it is not probable, that this was the first reference to the
ESTATE. Portlemon property, but at all events the lodgment was to be
Walker, L.J. made against the overdraft.

The correspondence shows that Mr. Stuart wrote on the 16th May inquiring why the proceeds of certain shares had not been lodged to the account, and also asking about the lodging of the Portlemon title-deeds, and stating he had been blamed about the account: because Colonel Stevenson wrote on the 18th that he was pushing his solicitor to get Mr. D'Alton, the Dublin solicitor, to make title, and that he hoped the conveyance "will soon be completed for lodgment with you."

He wrote again on the 24th May, enclosing securities to be held against the account, adding, "my solicitor says it will take a month yet to complete searches and perfect deed of conveyance of Portlemon estate. I am sorry at the delay, and am doing all in my power to have deed ready for lodgment with you as undertaken," *i.e.* obviously I have undertaken that you shall hold it against my account.

It seems that after this letter of the 24th May Mr. Stuart sent him a mortgage, the particulars of which we do not know, but which Colonel Stevenson did not wish to sign, and he gives his reason—in my opinion most important on the point I am dealing with. His reason is "an authority to hold such securities as are deposited with you as collateral security for our overdraft, until same is discharged should meet the case," and then he adds that if he, the manager, was not satisfied with holding the title-deeds of the Portlemon estate, which he hoped soon to deposit, he would give him such form of mortgage on it as he desired.

Is there not then a plain statement that the security would be deposited as collateral security for the overdraft? and that, so far as I can see, is a clear statement of the purpose of the deposit of the deed when it should be obtained.

What occurred in Dublin on the 15th July, when Mr. Lett lodged the deed with Mr. Tweedy, seems to me clear proof that the deed was lodged on the 15th, in accordance with an obligation

contracted between Stevenson and Stuart. Mr. Tweedy says:—
 “I recollect the lodgment which was made with me on the 15th July, 1895, made by Mr. Lett, solicitor. He was acting for Colonel Stevenson. On the 11th July Colonel Stevenson called as to his account, and as to delay” (the word “delay” is important) “in lodging deeds with reference to the Portlemon estate, and said that Mr. Lett would lodge the deeds. There was no written document then.” There is no suggestion that Mr. Lett had any discussion with Mr. Tweedy as to security or its terms. Mr. Lett only acted apparently on directions to lodge the deed, and so far acting for Colonel Stevenson: any discussion that took place was between Stevenson and Tweedy on the 11th, when the delay in lodging was a topic. The conveyance was lodged for Stuart, and was intended to be so, for Colonel Stevenson wrote on the 13th July:—“The conveyance of Portlemon property was signed on Thursday, and Mr. Lett will have lodged same with Mr. Tweedy before now.” This appears to me carried out what he undertook. Mr. Lett did not see Mr. Tweedy till the 15th, when he lodged the deed, and on same day Tweedy sent it on to Stuart to hold against the account, in the words of Colonel Stevenson in his former letter, “as collateral security for our overdraft until same is discharged.”

The letter of the 13th July shows Colonel Stevenson on the 11th explained the delay to Tweedy, and guaranteed the lodgment by Mr. Lett, thus carrying out, though late, the undertaking in his letters.

I cannot come to the conclusion that if Mr. Lett had not lodged it, and it had not been lodged, the bank would not have been able to enforce a security under the letters. If I am right an equitable mortgage was created by the writings. If this question had arisen, I think the test would be the true construction of the letters, not what was the only possible one. If there was a writing or series of writings creating an equitable mortgage, it does not appear to me open to serious argument that this equitable mortgage would not have been postponed to the registered deed for value. It was long since settled by decisions upon the Middlesex Registry Act (7 Anne c. 20), that “conveyance” in that statute includes a writing not under seal, *e.g.*

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 1901. and assumed in the *Agra Bank v. Barry* (3) in the House of Lords;
In re and these decisions, so far as English ones are concerned, apply
 STEVENSON'S *a fortiori* to our Registry Act of 6 Anne, c. 11, where the words
 ESTATE. "deed, conveyance or disposition" occur.
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Further, the case of *In re Hamilton* (4), which binds us, not only proceeds on that view, but also establishes that if there is a writing constituting an equitable mortgage, it is not saved from postponement, because from some informality in its form it cannot be registered in the manner the Act provides.

A "conveyance," too, may be contained in a series of documents, and the Act expressly makes provision for registering in such a case. The case of *Rodger v. Harrison* (5), in which it was held that a memorandum of agreement for sale was not within the scope of the Yorkshire Registry Act 1884, turned upon the peculiar language of that Act, and the definition of "assurance"; but both in that case and in *Calcott and Elvin's Contract* (6)—the other case relied on—the authority of *Credland v. Potter* (2), as decided on the Middlesex Act was expressly recognised.

The real question in this case is the construction of the letters, upon which I take the same view as Judge Meredith; but as my colleagues think differently, the order appealed from will of course be discharged, and the priority of the bank established according to the law as settled in *Burke's Estate* (7).

HOLMES, L.J. :—

The question for decision arises from a contest as to priority between two incumbrances on the lands of Portlemon which have been sold, and the purchase-money of which is being distributed under the direction of the Land Commission.

No. 8 in the Schedule of Incumbrances, as settled by the Examiner, is thus described: "On the 15th May, 1895, the vendor lodged the title-deeds of the lands in this matter by way of

(1) 2 H. & M. 170.

(2) L. R. 10 Ch. 8.

(3) L. R. 7 H. L. 135.

(4) 9 Ir. Ch. R. 512.

(5) [1893] 1 Q. B. 141.

(6) [1898] 2 Ch. 460.

(7) 9 L. R. Ir. 24.

equitable mortgage to secure moneys due by him to the Provincial Bank. The sum of £4602 14s. 1d. was due for principal on the 31st December." No. 9 is a mortgage by deed dated the 29th July, 1896, and registered two days later to secure two sums of £4500 and £3500 respectively to James Watt Fullerton and Robert Joseph Stevenson. The last-named gentleman filed an affidavit by way of objection to the schedule, claiming that the position of the two incumbrances should be transposed, and that the mortgage by registered deed should take priority of that by deposit.

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In re Burke's Estate (1), decided in this Court in the year 1881, laid down that a security given by depositing with the lender the title-deeds of a property without a writing takes priority over a subsequent disposition for value of the same property carried out by means of a registered deed. The *ratio decidendi* seems to be that a deposit of this character, although not within the Irish Registry Act, and not contemplated by that statute to be the subject of registration, is recognised by our law as a method of creating a valid charge; and therefore ought to take priority according to its date. This case, following a line of authorities in both England and Ireland, and having been accepted for the last twenty years as declaratory of the law in this country, has passed beyond the region of criticism in this Court; and the present appeal has been argued on the assumption that it cannot now be reconsidered.

The affidavit of Mr. R. J. Stevenson puts forward two grounds for transposing the order of the incumbrances—one, that the bank continued to make advances after it had notice of the subsequent mortgage; the other, that the bank at the time of the deposit had notice of a previous mortgage. The first of these objections was disproved in point of fact; the second cannot be sustained in point of law. It was sought to be supported upon the principle that special circumstances may give a puisne mortgagee a better equity than the holder of a prior security. But it has been settled in *In re Burke's Estate* (1) that such better equity does not arise merely because the prior incumbrance is created

Appeal. by a method outside the provisions of the Registry Act. Nothing
 1901. more than this exists in the present case. The suggestion is that

In re the bank, in consequence of having notice at the time of the
 STEVENSON'S deposit that there was a prior mortgagee who might be expected
 ESTATE. to have possession of the title-deeds, became responsible for the
 Holmes, L.J. owner concealing from the subsequent lender their true disposition.
 There is no legal foundation for this proposition. The deeds
 were accepted as a security in good faith from a person who was
 entitled to give them; and the charge thus created ought not to
 be affected by something that happened afterwards which the
 bank had no reason to foresee. Accordingly Meredith, J. held
 against the objections to the schedule as they were originally
 presented; and I agree with this portion of his judgment. But
 in the course of the hearing before him, a new ground of objection
 was discovered upon the production of four letters received by
 Mr. Stuart, the manager of the Provincial Bank in Londonderry,
 from Colonel Stevenson, the owner of the property.

The proposition founded on these letters, and accepted by the Judge, was that the incumbrance of the bank was created either by these documents in themselves, or by them taken in connexion with the deposit of the deeds; that they, therefore, constituted a conveyance within the Irish Registry Act; and that being unregistered they could impose no charge upon the property in priority to the subsequent registered mortgage.

It has been long since well settled that the statute of Queen Anne extends to any instrument in writing creating a charge on land. The passage in Lord Cairns' judgment in *Credland v. Potter* (1), in which he interprets the words "deed or conveyance" in the West Riding Registry Act, has been often quoted, and is equally applicable to the Irish Act. He asks, "Is an instrument not under seal giving a charge on the equity of redemption in an estate a conveyance within the meaning of the Act? There is no magical meaning in the word 'conveyance.' It denotes an instrument which carries from one person to another an interest in land." The writing with which Lord Cairns was dealing in that case was a memorandum given by the owner of an equity

(1) L. R. 15 Ch. 8.

of redemption to his mortgagee, stating that the latter held the deeds relating to certain specified property for securing the sum of £363 and costs, in addition to the sum of £1100 secured by a mortgage dated the 17th October, 1871, and concluding with the following words:—"And we hereby undertake to execute at any time a further charge for better securing the said sum of £363 and interest thereon." There could be no doubt that it was intended to create by this document a further and immediate equitable charge upon the property in favour of the mortgagee; and as it was not registered, it was postponed to subsequent registered instruments.

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In *Credland v. Potter* (1) the person to whom the memorandum was given had already possession of the title-deeds as legal mortgagee; and the intention was that the further charge should be created by the written instrument alone. It is, however, immaterial whether a document, such as Lord Cairns referred to, is complete in itself or is intended to be accompanied or followed by a deposit of title-deeds. A borrower and lender may agree without any writing to have a loan secured in this way, and such a transaction will be outside the Registry Act and unaffected by its provisions. But if they elect to have the object of the deposit declared in writing, the written instrument is a "conveyance," and must be registered to insure its priority. This is very clearly put in *In re Hamilton* (2). In that case there was a letter accompanying the deposit of the deeds, stating the amount of the loan, the rate of interest, and the particulars of the property to be charged. It was in substance an instrument to which the Registry Act applied, although from want of form it was incapable of effective registration. The Lord Chancellor says:—"In point of fact the matter did not rest merely upon the deposit of the title-deeds. There was a very well drawn instrument which operated by way of charge on the estate, and was so made use of. Here is a writing; and although it is defective in some particulars, that is the fault of the party, and he cannot avail himself of the objection." *The Agra Bank Limited v. Barry* (3) was another case in which a

(1) L. R. 10 Ch. 8.

(2) 9 Ir. Ch. R. 512.

(3) I. R. 6 Eq. 128; L. R. 7 H. L. 135.

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letter stating the terms on which title-deeds were deposited as a security for a loan was assumed to be a conveyance within the Irish Registry Act. In that case the letter was a formal application for a loan for a definite amount for a specified period with a statement of the security to be given therefor, and was intended to be laid before the directors as a proposal on which they might, and, as a matter of fact, did act. The case of *Copland v. Davies* (1), although it was not decided under the Irish Registry Act, may also be referred to as containing a letter accompanying the deposit of title-deeds to secure an overdraft to a bank—a letter the terms of which were such as to leave no doubt that it was intended to be the instrument of charge. I have thought it convenient to preface my consideration of the letters relied on in this case with a reference to two or three authorities that illustrate the mode in which the legal principle relied on by the respondent has been applied.

There is in truth no difficulty in ascertaining the law. The sole question is I think the intention and effect of the documents. It is to be regretted that the point on which the judgment of Meredith, J. depended was not raised with more formality and accompanied with fuller information. The letters relied on were disclosed during the examination of Mr. Stuart on a different branch of the case, and we are left to infer from inadequate materials the circumstances under which they were written. It is certain that they form only part of the communications, oral or written, that passed between Colonel Stevenson and Mr. Stuart; and it is always difficult to construe a one-sided correspondence. The first letter is dated 26th March, 1895. Colonel Stevenson's account with the Londonderry branch of the Provincial Bank was then considerably overdrawn; and I would gather that the letter was in reply to a pressing request to reduce the overdraft. It begins by referring to an enclosed bill to be discounted and credited to the account. It then asks that the writer's pass-book should be posted. There is a promise of a further lodgment of £400 or £500 in a few days; and it winds up with the words "When I

(1) L. R. 5 H. L. 358.

receive the title deeds of Portlemon property from my solicitors I will have same at once lodged with you." Whether Mr. Stuart had ever heard of the Portlemon property before I have no means of knowing with certainty, but it is probable that he had. It appears from other evidence that it had belonged to John Joseph Keon, who had executed a written agreement dated the 10th December, 1894, to sell it to Colonel Stevenson for the sum of £8000 to be secured by a mortgage of the property itself. I infer that this was more in the nature of a family arrangement than an ordinary business transaction, inasmuch as the value of the lands was far in excess of the purchase-money, and the vendor only survived the date of the agreement by a few days. The sale was ultimately carried out on the 11th July, 1895, by Mary Treacy, the devisee and executrix of the vendor, under a will that had been proved in the previous February; and there is no doubt that the lands, even subject to the mortgage of £8000, would be a good security for a far larger sum than Colonel Stevenson owed the bank. Now, if Mr. Stuart knew the particulars I have mentioned, and understood that his customer by the final clause of this letter was giving the bank an actual charge on a valuable property of which he was equitable owner under an agreement, there would be no need for further anxiety about the overdraft. On the other hand, if he considered the reference to the Portlemon estate as merely a quieting assurance that security would be forthcoming at some future time, he would probably attach no more value to it than to the promise to lodge £400 or £500 in a few days. The subsequent letters I think show that the manager took the last-mentioned view. The next one is dated the 18th May, 1895. It is evident that the pressure to keep down the overdraft was continued; and accordingly Colonel Stevenson wrote that his broker was realising certain securities with the view, I presume, of lodging the proceeds. He then says that he is pushing his solicitor to complete the deed of the Portlemon estate as quickly as possible, and he expresses a hope that it would soon be ready for lodgment with the manager. He adds that he would look out some additional security which he would hand over till all would be completed to the satisfaction of the directors; and he concludes with an expression of regret that

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1901. assurance that with a little patience it would be put on a satis-

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Holmes, L.J. On the 24th May, 1895, Colonel Stevenson wrote again, sending a lodgment of £250 with a policy on his own life, a conveyance of Rockbull Cottage, and a judgment on the Stewart estate, which I presume constituted the additional security referred to in the previous letter, and saying that it would take another month to perfect the conveyance of Portlemon estate, and that he was doing all in his power to have it ready for lodgment as undertaken. I cannot conceive that either the writer or the receiver of these letters conceived that the overdraft was thereby charged on the property. They seem to me to speak of something to be done at a future time outside and independent of the correspondence, which if and when done would have the effect of securing the bank. There is an important letter of the 7th June, 1895, which I do not find referred to in the order appealed from; but as it was read by Meredith, J. in his judgment, I presume its omission is accidental. It appears from this letter that Mr. Stuart, still uneasy about the overdraft, had a mortgage prepared of some other property which Colonel Stevenson declined to sign, as he considered it to be unnecessary. He adds: "If, however, in addition to holding the title-deeds of the Portlemon estate, which I hope soon to deposit with you, I can and will give you such form of mortgage as you desire against that property and the insurance policies on the life of Edward de Blaquiére you hold." There is then expressed the usual hope that the writer would soon make a considerable lodgment.

There is some obscurity as to the meaning of the part of this letter which I have quoted textually; but the purport of it I take to be that Colonel Stevenson hoped by means of a deposit of the title-deeds to give the bank a charge on the Portlemon estate, and that if this equitable security when effected was considered unsatisfactory, then something more would be done. The nature of the interviews with, or communications from, Mr. Stuart, that caused these letters to be written, is easily guessed. The manager, finding his directors alarmed by the amount to which Colonel Stevenson's account had been overdrawn, was pressing that gentleman to reduce the balance against him; and he was met with com-

forting assurances that if time were given all would be right. Amongst the encouraging prospects, Colonel Stevenson held out that he was carrying out the purchase of a valuable property; and that when completed the title-deeds would be available as an equitable security, but I can find nothing in the correspondence to lead to the conclusion that he was there and then charging, or contracting to charge, his present or future interest therein. He was pointing out the means by which he would soon be able to "put the account on a satisfactory basis," and in the meantime he was asking for a "little patience." The conveyance of the Portlemon estate was executed on the 11th July, 1895, and at that time Colonel Stevenson, being in Dublin, saw the general manager and solicitor of the bank. We have no specific evidence as to what led to this interview. Presumably Colonel Stevenson had been asked by Mr. Stuart to settle matters at headquarters when in Dublin. Mr. Tweedy, the solicitor, says that Colonel Stevenson called as to his account and delay in lodging deeds; and he said that Mr. Lett, his solicitor, would lodge the deeds, which was duly done in Dublin on the 15th July, Mr. Tweedy sending them on the same day to Mr. Stuart in Londonderry. I gather that at the interview of the 11th a definite arrangement as to the deposit was for the first time come to between the general manager, the solicitor of the bank, and Colonel Stevenson; and it is probable that the amount to be overdrawn, which a subsequent letter states to be £3000, was fixed on that occasion. On the 13th July Colonel Stevenson wrote to Mr. Stuart telling him that he had seen Mr. Tweedy, who had made some additional requirements as to insurance policies, and adding that the conveyance of the Portlemon property will have been lodged with Tweedy before now.

The foregoing is, I believe, a full and correct statement of the materials from which the nature of the transaction is to be inferred; and the question is, what conclusion ought the Court to draw from them? The law is clear, but different minds may not take the same view of the facts; and, while I appreciate the grounds of the decision of Meredith, J., I regret that I am unable to adopt them. We have in this case a meeting between on the one hand the general manager and the solicitor of a great banking

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1901.

In re
STEVENSON'S
ESTATE.

Holmes, L.J.

Appeal. establishment carrying on business in every part of Ireland, and
 1901. on the other a customer of a local branch. It is then arranged that

In re in the course of a day or two the solicitor of the customer will
 STEVENSON'S deposit with the bank the conveyance of an estate as security for
 ESTATE. the customer's overdraft; and this is carried out between the two
 Holmes, L.J. solicitors. Mr. Tweedy, who is as familiar with this branch of
 the law as any Judge in Ireland, had never heard of the corre-
 spondence with Mr. Stuart, and he believed that he was accepting
 a security dependent entirely on the deposit of title-deeds, and
 similar in its character and incidents to transactions in which
 Irish banks on the faith of the judgment in *Re Burke's Estate* (1)
 have made large advances. Mr. Lett, a practitioner of large
 experience, hands over the deeds without writing or memorandum,
 believing that the charge is to arise from the mere deposit. Under
 these circumstances I find it impossible to hold that the equitable
 incumbrance was created in whole or in part by letters written by
 the customer to the local manager, holding out a prospect that a
 security would be given at a future time. If these letters be com-
 pared with the documents which were held to create a charge in
 the cases I have referred to, the difference between them is ap-
 parent. The language in the one case shows the intention of both
 parties to be to create an incumbrance there and, then; in the
 other it seems equally clear that such an idea never occurred either
 to Colonel Stevenson or Mr. Stuart. For these reasons I am
 of opinion that the appeal ought to be allowed; but I am glad to
 know that if counsel are rightly instructed, neither party will
 ultimately be a loser. If, as we are told, there is sufficient
 security to discharge both incumbrances, an innocent lender will
 not be injured by the result of the present litigation.

Solicitor for the Provincial Bank of Ireland: *John Tweedy.*

Solicitor for Robert J. Stevenson and James W. Fullerton: *J.
 Kelso Reid.*

R. D. M.

IN RE KEARNEY'S ESTATE (1).

Appeal.
1901.*Landed Estates Court and Land Judge—Receiver—Life estate—Cost of appointing—Money expended by receiver.*

Oct. 28.

An order for sale was made on the petition of a tenant for life of lands, who subsequently became tenant to the Court pending the matter. In 1889 a receiver was appointed on the application of a mortgagee. In 1895 that receiver was discharged, and W. was appointed receiver on the application of the owner. In 1899 the owner died, leaving no assets, and there was a large arrear of rent. W. had not collected any rents out of the lands, but he had expended some money on behalf of the estate, and incurred costs, when he was discharged by the remainderman:—

Held (reversing the decision of Ross, J.), that W. was not entitled to be paid the money expended, or the costs, by the mortgagee who had first appointed a receiver.

APPEAL from the order of Ross, J., dated the 8th July, 1901, by which he ordered A. W. Harris to pay to the receiver, A. H. Wynne, the sum of £26 11s. 11*d.*, amount due to him as the balance on foot of his final account, and for the costs of his final account, and of vacating his recognizance.

The petition had been presented by John Kearney, the owner, for the sale of his own life estate in the lands of Kilskyre, in the county of Meath. On the 2nd August, 1889, an order was made on the application of A. W. Harris, a mortgagee on the life estate, appointing Richard Tevlin receiver. The owner became tenant to the Court of the entire of the lands pending the matter. On the 14th March, 1895, an order was made discharging Tevlin, and A. H. Wynne was appointed receiver in his stead.

On the 21st February, 1899, John Kearney, the owner, died; and by order dated the 28th July, 1899, the receiver was discharged on the application of the remainderman. From the time that he was appointed receiver in 1895 until the death of John Kearney, Wynne had not collected any rent, and he had expended

Appeal. on behalf of the estate £16 7s 5d., and this, along with £6 10s. for
 1901. the costs of passing his final account and £3 14s. 6d. for vacating
In re his recognizance, made up the sum of £26 11s. 11d. No personal
 KEARNEY'S representative had been raised to the late owner, who died heavily
 ESTATE. in debt, owing the estate £366 for arrears of rent.

There being no funds available for payment to the receiver of the money which he had expended and of the costs, Ross, J., made an order that these sums should be paid by Mr. Harris, the mortgagee, who had first appointed the receiver. From that order Mr. Harris appealed.

Matheson, K. C., and *H. Morgan Byrne*, for the appellant, referred to *Slack's Estate* (1).

O'Connor, K. C., and *Moriarty*, for the receiver :—

The principle of the judgment of Ross, J., was that a person who appoints a receiver, and makes him the officer of the Court, is responsible for all the costs and expenses. If a person puts the sheriff in motion, he is liable for all expenses incurred : *Farrelly v. Lynch* (2). The costs and expenses of the receiver must be paid out of the property : *Batten v. Wedgwood Coal and Iron Company* (3).

FITZ GIBBON, L.J. :—

The application made to the Land Judge in this case was for an order that Mr. Harris, a puisne incumbrancer, should pay the sum of £26 11s. 11d., being the balance found due to the receiver upon his final account, and also the costs of passing his final account and of vacating his recognizance. Before we can order Mr. Harris to pay these sums it must be shown that they are legally recoverable from him, either as a debt, or as money paid for his use, or on some undertaking to pay them.

The absence of law can not be a sufficient ground for making a man pay money by order of a Court of Equity. What was the relation between Mr. Harris and the receiver? Was it that of debtor and creditor? The only action ever taken by Mr. Harris

(1) [1896] 1 I. R. 181. (2) [1897] 2 I. R. 455. (3) 28 Ch. D. 317.

in the matter was that, after an order had been made for the sale of the owner's life estate to pay the incumbrances upon it, he, being a mortgagee, got a receiver appointed; *i.e.* he got the possession of the lands taken from the owner, and had the management and the receipt of the rents and profits placed under the control of the Court. The order directing the appointment of the receiver provided that notice should be given to the owner, but Mr. Harris left it to the Court to manage the property, to see to the collection and due application of the income, and he never got anything out of it for himself. When a receiver is appointed, he undertakes no obligation to advance any money, or to incur any expense for the benefit of the estate. If he chooses to do so, the question arises—for whose benefit, and on what credit, has he made the advance or incurred the expense? *Prima facie*, advances by a receiver are made on the credit of the estate or of the owner. There is no presumption of authority to a receiver to give credit, or to incur expense, at the risk, or on behalf of, the incumbrancer who has asked the Court to appoint him. There was no express or implied request by Mr. Harris to the receiver to spend money, or to incur expense for him, save so far as he had a beneficial interest in the estate, and he gave no undertaking to the Court or to the receiver to bear any liability.

The Court required the owner to become tenant at an occupation rent. There would have been money to meet all expenses if he had paid his rent, but he did not: at his death he owed £366 for arrears, which the receiver did not collect, and which the owner as tenant did not pay. It would be unjust now to make the puisne mortgagee indemnify the receiver for having become a creditor of the estate for advances which he might have paid out of the rents if he had not allowed them to get into arrear. The costs of passing the final account and of vacating the recognizance were incurred in releasing the receiver, and they cannot be made chargeable against Mr. Harris, who got nothing from him, and was not interested in his discharge. If the claim is now recoverable at all, it must be recoverable from the assets of the tenant for life.

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The decision in *Slack's Estate* (1) goes beyond this: in that

(1) [1896] 1 I. R. 181.

Appeal. case the first incumbrancer got two receivers successively appointed, and the Land Commission got a third appointed; final
1901. accounts were passed; legal proceedings were taken, and costs were incurred under the direction of the Court, which Madden, J.,
In re KEARNEY'S ordered the Land Commission to pay. This Court discharged the
ESTATE. order, because the Land Commission had not so intervened as to
Fitz Gibbon, render itself liable, but neither here nor below did anyone suggest
L.J. that the first incumbrancer, Mr. Marcus Purcell, whose action and position were identical with those of Mr. Harris here, could be made liable.

We have been told by counsel that Ross, J., acted on a statement that it was the practice of the Landed Estates Court to hold the party who appoints a receiver liable for his expenses and advances; but we cannot admit the existence of a practice, when no case has been referred to in which the estate has failed to pay the costs of appointing a receiver, and where we can find no legal or equitable basis of liability.

WALKER and HOLMES, L.JJ., concurred.

Solicitor for the appellant: *F. Kennedy.*

Solicitors for the respondent: *Ryan & O'Brien.*

R. D. M.

IN RE MADDEN'S ESTATE (1).

Appeal.
1901.*Practice—Costs—Liability of the Crown*—18 & 19 Vict. c. 90, ss. 1, 2. Dec. 4, 5, 12

The Crown is not liable to pay costs under the Crown Suits Act (18 & 19 Vict. c. 90), unless the action, or proceeding, by, or on behalf of, the Crown, is taken in the name of the Attorney-General.

Reg. v. Beadle (7 E. & B. 492) and *Secretary for War v. Booth* ([1891] 2 I. R. 692) approved of and followed.

THE petition was filed by an incumbrancer for the sale of certain lands in the barony of Tirawley and county of Mayo. In the course of the proceedings notice was served on the Commissioners of Woods and Forests, in case there was any quit rent claimed as payable to the Crown. The Commissioners of Woods and Forests claimed the estate on the ground that these lands were, and had come, under the Irish Act of Settlement, and that the Crown had never granted these lands by patent, or otherwise. The lands were held under Church leases, but there was no lease forthcoming of the portion of the lands in question prior to 1853, although that lease was stated to have been made partly in consideration of the surrender of a former lease, though no such former lease was produced. The petitioners then produced two old maps, made for the Bishop of Killalla, to prove that the owners, or their predecessors in title, had been in possession for more than sixty years. Ross, J. admitted these maps in evidence, and held that the owners had a good title. The Commissioners of Woods and Forests appealed against this decision, and for the purposes of the appeal the respondents filed two affidavits made by tenants on the lands to show that the owner's possession went back for a period longer than sixty years. The appellants being then satisfied that they could not dispute the title, served notice of intention to withdraw the appeal, without paying costs. The respondents disputed their right to do this.

Appeal.
1901.
In re
MADDEN'S
ESTATE.

Oulton, for the respondents :—

The Crown are liable to pay costs, as they have failed in their contention. The Crown Suits Act of 1855 (18 & 19 Vict. c. 90) was passed for the purpose of placing the Crown in the same position as the subject with respect to litigation : *Re Dublin, Wicklow, and Wexford Railway Company* (1). In *In re Wood's Estate* (2) the Commissioners of Works and Buildings were held liable to pay costs. By section 53 of the Judicature Act costs both in the High Court of Justice and Court of Appeal are in the discretion of the Court ; and the Court can award costs against the Crown. An Act, which gives the Judges power to exercise their discretion in every case as to costs, of necessity repeals previous Acts which directed costs to follow certain rules, and give no discretion : *Garnett v. Bradley* (3). In legal proceedings the Treasury are the Crown, and these Commissioners are the servants of the Treasury : 14 & 15 Vict. c. 42, s. 32. They have not the lands vested in them, but have merely the management of the lands, including powers of sale and leasing : 10 Geo. 4, c. 50, ss. 8, 22, and 34. There is no case in which it was held that the Commissioners of Woods and Forests are entitled to immunity from costs.

Campbell, S.-G., and *Garrett Walker*, for the Commissioners of Woods and Forests :—

The practice in equity originally was that the Crown could get costs, though not liable to pay them : *Attorney-General v. Ashburnham* (4). The Court has jurisdiction to make a party pay the Crown its costs under 59 Geo. 3, c. 91 : *Lord Advocate v. Hamilton* (5) ; *Smith v. Earl of Stair* (6).

The Crown Suits Act of 1855 is confined to proceedings in which the Attorney-General sues : *Reg. v. Beadle* (7) ; *Secretary for War v. Booth* (8). In *Galvin's Case* (9) the question never arose. In *Wood's Estate* (2) the Crown were held liable for costs, because

(1) 31 L. R. Ir. 1.	(6) 2 H. L. Cas. 807.
(2) 31 Ch. D. 607.	(7) 7 El. & Bl. 492.
(3) 3 A. C. 944.	(8) [1901] 2 I. R. 692.
(4) 1 Sim. & S. 394.	(9) [1897] 1 I. R. 520.
(5) 1 Mac Q. 46.	

the Lands Clauses Acts were incorporated with the other statutes. The object of the Judicature Act was to regulate Courts and procedure, and it does not impose any new liability as to costs which did not previously exist, or give any new jurisdiction to award costs: *Mills' Estate* (1).

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1901.

In re
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ESTATE.

FITZ GIBBON, L.J. :—

Dec. 12.

The question which we have now to decide was twice previously raised in this Court, but on each occasion the Treasury agreed to pay.

The way in which it has now arisen is this. Under the Rules of the Land Judge's Court, notice was served on the Commissioners of Woods and Forests that certain lands were about to be sold. This notice was given lest there might be some claim for quit rent payable to the Crown. Not content with discharging their duty to look after quit rent, the Commissioners put forward a claim that the lands were Crown property, and that the owner had no title. The Land Judge could proceed no further until this claim had been investigated, and the petitioner was obliged to bring it up for consideration. The owner's estate was held under Church leases; he naturally relied on these as a sufficient root of title. But because the existing leases (though probably renewals) were not sixty years old, the Commissioners contended that they showed no title against the Crown. The owner then put in evidence, as proof of prior possession, two ancient maps. Such maps do not, by our strict law, ordinarily become better evidence by age than they were when first made. But Ross, J. admitted them, and held that the owner had shown title going back beyond sixty years. The point was made that costs could not be given against the Crown; accordingly Ross, J., though he decided against the Crown, gave the owner his costs only out of his own estate. The Commissioners of Woods and Forests then appealed, on the ground that the maps had been erroneously admitted as evidence of possession. The owner then obtained further evidence, proving so clearly that he and his predecessors had been in lawful

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possession of the lands for more than sixty years, that, on the production of this evidence, the Attorney-General advised that the Crown had no case, and the Commissioners served notice withdrawing their appeal; but they declined to pay any costs, though they had put forward an unfounded claim, and had put the owner to expense in disproving it. The question is—Are they liable for the costs of the appeal?

At common law there is no power to award costs against a public body suing on behalf of the Crown. The Commissioners of Woods and Forests, like the Commissioners of Public Works in Ireland, fulfil many functions and fill different characters. In some of these they, and the corresponding body in England, do not represent the Crown; in others they have been held liable to costs: *e.g.* as incorporated by 3 & 4 Vict. c. 87, for the purpose of executing works in London, and acting under 18 & 19 Vict. c. 95, which incorporates the Lands Clauses Act: *In re Wood's Estate* (1). But both as to the Commissioners, and also as to others occupying similar positions, such as the Secretary of State for War, the general rule is that, when suing on behalf of the Crown, they are not liable for costs, unless by virtue of some statute *ad hoc*, or when acting under some incorporated statute which enables costs to be given, or under some statute in which the Crown is expressly mentioned.

The only statutes to which Mr. Oulton has been able to refer us, as rendering the Commissioners liable for the costs in this case, are two—(i) the Crown Suits Act, 1855 (18 & 19 Vict. c. 90); and (ii) the Judicature Act. The Crown Suits Act contains very wide words, indicating an intention that it should apply to “all . . . legal proceedings . . . before any Court . . . whatever . . . on behalf of the Crown against any . . . person . . . in respect of any lands . . . or . . . goods . . . the proceeds whereof, or the rents or profits of which said lands, are to be carried to the Consolidated Fund.” The preamble recites that it is expedient to assimilate the law as to the recovery of costs in such proceedings on behalf of the Crown, to that in force as to proceedings between subject and subject. But the enacting words of section 1 are that the Attorney-General, or in Scotland the Lord Advocate, shall be

(1) 31 Ch. D. 607.

entitled to recover costs for the Crown, where judgment shall be given for the Crown, in the same manner as in proceedings between subject and subject, and section 2 enacts that if "in any such . . . proceeding" judgment shall be given against the Crown, the defendant shall be entitled to recover costs "in the same manner as though such proceeding had been had between subject and subject."

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The effect of this Act was considered by the English Queen's Bench two years after it passed, in *Reg. v. Beadle* (1), and although Lord Campbell held the law to be in an unsatisfactory state, and thought it desirable that it should be reviewed, the Court was coerced to decide that both sections of the Crown Suits Act applied only to proceedings by the Attorney-General, or by the Lord Advocate, suing each in his own name on behalf of the Crown.

In *Wood's Estate* (2), the corresponding Commissioners in England were held liable to pay costs, because they were specially incorporated in respect of their functions as to Public Works in London, and also by bringing in aid the Lands Clauses Act, under which they had proceeded. On that ground the principle of *Reg. v. Beadle* (1), was held inapplicable there. The Vice-Chancellor, in the case of the *Dublin, Wicklow, and Wexford Railway Company* (3), also gave costs against the Crown, and it may be that the Lands Clauses Act was available there also, though the report is not clear upon that point. But neither of these cases is necessarily in conflict with *Beadle's Case* (1).

In *Wood's Case* (2) the question was also raised whether the Judicature Act did not give power to award costs against the Crown, but it was not decided. We have always been under the impression in this country that, speaking generally, and in the absence of express provisions, the Judicature Acts reorganized Courts and regulated procedure, but did not alter rights, or impose new liabilities, nor did they affect the Crown, except where expressly mentioned. But the question reserved in *Wood's Case* (2) came up again soon afterwards in *Mills' Estate* (4), and

(1) 7 El. & Bl. 492.

(2) 31 Ch. D. 607.

(3) 31 L. R. Ir. 1.

(4) 34 Ch. D. 24.

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there, following *Foster v. Great Western Railway Company* (1), the Court decided that the Judicature Act and Rules did not give jurisdiction to order payment of costs in any case where the Court could not do so before the Act.

The history of the present question in this Court is peculiar. It came before us on May 1, 1896, in *Reg. (Moore) v. Abbott* (2). The Crown was an unsuccessful appellant, and claimed immunity from costs. The Court intimated that it seemed undesirable, if not unjust, that a private person who had been harassed by the Crown, and had been successful, should be left to bear his own costs; and, on the application of the Crown counsel, an adjournment was granted to enable the Treasury to consider the position. The case came on again at the next sittings, and the Crown counsel then stated that he had authority to consent to an order giving the costs against the Crown. So the question rested until this year, when it was again raised in *Reg. (County Council of Wexford) v. Local Government Board* (3), a case of *certiorari*, on February 25, 1901. When Mr. Ronan, for the Crown, raised the question, he was told that there had been no decision upon it, and that, if he desired to argue it, he might do so on the following morning. On the following morning he stated that he would not argue it, and the successful party got his costs. It then arose and was argued before the King's Bench in *Secretary of State for War v. Booth* (4). The Chief Baron, in giving judgment, said that the question was not open, having regard to *Reg. v. Beadle* (5), which had not since been deliberately departed from, and he referred, among other cases, to *Chubb's Case* (6)—“When Jessel, M.R., granted a favor to the Crown it was on the terms that the liability of the Crown to pay costs should be admitted.”

We are all of opinion that we cannot distinguish *Beadle's Case* (5), and that it was rightly decided, and as the law has been allowed ever since to remain in the condition which the English Court of King's Bench declared to be unsatisfactory, it is not for us to assume the position of legislators, and to do that which that Court said, forty-four years ago, ought to be done by Parlia-

(1) 8 Q. B. D. 515.

(2) [1897] 2 I. R. 424.

(3) Unreported.

(4) [1901] 2 I. R. 692.

(5) 7 El. & Bl. 492.

(6) 43 L. T. (N. S.) 83.

ment. We must therefore hold the Crown entitled to withdraw this appeal without paying costs.

One observation, however, it is our duty to make. The formal and proper form of claiming these lands for the Crown would have been by a proceeding in the name of the Attorney-General. It was by proceeding in their own name that the Commissioners of Woods and Forests have deprived the owner here of costs which come within the scope of the Crown Suits Act, 1855. In any similar case in future, it will be for the Court to determine whether any body or person coming in to litigate "on behalf of the Crown," in a matter which is within the province of the Attorney-General, should not be put under terms such as Jessel, M.R. imposed in *Chubb's Case* (1), viz.—to undertake to abide the order of the Court as to costs. If these terms are refused, then the Crown can be left to proceed in a regular manner, in the name of the Attorney-General, and so as to give to the adverse litigant the benefit of the Crown Suits Act, of which the owner here has been deprived by the action of the Commissioners of Woods and Forests in proceeding in their own name.

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WALKER, L. J. :—

In this case the Commissioners of Woods and Forests were served with the usual notice for the purpose of ascertaining whether any, and if so, what quit rents were claimed by the Crown out of the lands for sale. The Crown had forwarded a claim that certain lands included in the order for sale were Crown lands, and that the Crown was owner, and that those lands should be excluded from the sale. This issue so raised was decided against the Crown, and the question is, can we give costs to the successful party? I think not. It is one of the prerogatives of the Crown that the King, and any person suing for his use, shall not be compelled to pay costs (*Chitty on Prerogative*, 310), and it is also said that it is beneath the dignity of the Crown to receive them. This second branch of the proposition is not universally true, as the Crown in Courts of Equity constantly

(1) 43 L. T. (N. S.) 83.

Appeal. receives costs, *e.g.* in charity cases, where the Attorney-General
 1901. is made a party; but there is no exception to the rule giving
In re immunity from costs, unless where some statute can be
 MADDEN'S referred to binding the Crown, expressly or by necessary
 ESTATE. implication, to pay costs in that particular case. There are
 Walker, L.J. several such statutes, for instance 18 & 19 Vict. c. 90, Customs
 Consolidation Act (16 & 17 Vict. c. 107), 20 & 21 Vict. c. 43,
 considered in *Moore v. Smith* (1); also 24 & 25 Vict. c. 92;
 40 & 41 Vict. c. 13, and the Petition of Right Act.

In *Wood's Estate* (2), costs were given, because the Lands
 Clauses Act, which made costs *prima facie* payable in the instance
 in question, was treated as incorporated with the 18 & 19 Vict. c.
 95 in effect, and therefore its provisions bound the Crown. The
 language of the 18 & 19 Vict. c. 90 comes nearest to a case like
 the present, because it makes costs payable in all informations,
 actions, suits, or legal proceedings before any Court or tribunal
 whatever, by or on behalf of the Crown, in respect of any land
 belonging to the Crown, the proceeds whereof, or the rents and
 profits of which, would be carried to the Consolidated Fund, or in
 respect of any sum or sums of money due and owing to Her
 Majesty by virtue of any Act of Parliament relating to the Public
 Revenue; but *The Queen v. Beadle* (3) decided that this Act only
 applies where the Attorney-General or Lord Advocate is suing, and
 that decision, come to by a reluctant Court, has never been ques-
 tioned. *Beadle's Case* (3) was an information for a penalty by an
 Officer of Excise, who prosecuted for Her Majesty, and here the
 Commissioners of Woods and Forests claimed on behalf of, and for
 the benefit of, the Crown. So in the recent case of *The Secretary*
for War v. Booth (4), the War Secretary, in whom Crown lands
 in certain cases are vested for the Crown, sued on behalf of the
 Crown, and was defeated; but it was held that there was no
 power to give costs against him, or in other words that the case
 stood as at common law. The Vice-Chancellor in *Dublin, Wicklow*
and Wexford Railway; Ex parte Jordan (5) came to a different
 conclusion on the ground apparently that the claim of the Crown

(1) 1 Ell. & Ell. 597.

(4) [1901] 2 I. R. 692.

(2) 31 Ch. D. 607.

(5) 31 L. R. Ir. 1.

(3) 7 El. & Bl. 492.

to the foreshore was a proceeding within the meaning of the 18 & 19 Vict. c. 90; but *Reg. v. Beadle* was not cited, and the case does not seem to have received full discussion. If it proceeded on the grounds in *Wood's Estate* (1), it would be no authority here. The general terms of the Judicature Act and Rules under it, placing the costs of all cases in the discretion of the Court, were also relied on; but it is well settled that general words in a statute do not bind the Crown, and *Mills' Estate, Ex parte Commissioners of Works* (2) is an express authority that costs can be awarded under the Judicature Act only in cases where they could have been awarded before.

We have no jurisdiction therefore to give costs against the Crown Department, and in this respect we are following the decision of Judge Ross, not only in this case, but in *Vernon's Estate* (3).

HOLMES, L. J. :—

This appeal having been withdrawn, it would have been in accordance with the usual practice of the Court to order the appellants to pay the costs of the respondent up to the service of the notice of withdrawal, were it not that the appellants, who are the Commissioners of His Majesty's Woods, Forests, and Land Revenues, claimed that as they represent the King in the litigation, the Court has no jurisdiction to make such an order. It is no doubt a grievance that where an unfounded claim to a man's property is made by the Crown the expense of defending his ownership must be borne by the successful litigant; and accordingly the Court gave the respondent an opportunity of having the question fully discussed. Mr. Oulton has argued it with clearness and ability on two grounds. First, assuming that the appellants are the Crown, he submits that his client's right to costs is secured either by 18 & 19 Vict. c. 90, or by the Judicature Act. In the alternative, he submits that the appellants are not the Crown, that they are either interlopers without authority to act on behalf of the Sovereign, or that they are an independent body, not entitled to the immunity from

Appeal.
1901.

In re
MADDEN'S
ESTATE.

Walker, L.J.

(1) 31 Ch. D. 607.

(2) 34 Ch. D. 24.

(3) [1901] 1 I. R. 1.

Appeal.
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In re
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ESTATE.
Holmes, L.J.

costs, which, in the absence of statutory provision to the contrary, is the right of the King. This last point is easily disposed of. The Commissioners of His Majesty's Woods, Forests, and Land Revenues are appointed under the Acts 10 George 4, c. 50, 2 & 3 Wm. 4, c. 1, and some amending statutes for the management of certain kinds of Crown property; and section 62 of 21 & 22 Vict. c. 72 enacts that in every case in which application shall be made to the Landed Estates Court for sale or conveyance of, or declaration of title to, the fee-simple of any land or hereditaments, the Judge, before making any final order for such sale, conveyance, or declaration, shall be satisfied that one calendar month's notice in writing of such application has been given to the said Commissioners on behalf of Her Majesty or Her successors, stating certain prescribed particulars.

It has been rightly regarded since the passing of the Act of 1858 that this section has the effect of making the Commissioners the guardians of the right of the Crown in relation to lands sought to be sold under that statute; and accordingly when the Commissioners gave notice that the Crown claimed the lands in this matter, Ross, J. stayed the sale until this claim should be decided by him. The appeal has been taken from his order disallowing the claim; and there can be no doubt that both in the proceedings before the Land Judge, and in this appeal, the Commissioners are the representatives of the King.

On this assumption Mr. Oulton relied on 18 & 19 Vict. c. 90; and I feel strongly that this statute was intended by those who framed it to extend to a case of this kind. In *Reg. v. Beadle* (1), however, it was held by the Court of Queen's Bench in England that sections 1 and 2 of that Act are not applicable to any cases except where the Attorney-General or Lord Advocate is a party. That decision has stood unchallenged for almost half a century, and has been repeatedly followed—the last occasion being in last June by our own King's Bench Division in the case of the *Secretary for War v. Booth* (2); nor has Lord Campbell's desire to have the law placed in a more satisfactory state been as yet yielded to by Parliament, for Mr. Oulton's argument that a

(1) 7 El. & Bl. 492.

(2) [1901] 2 I. R. 692.

change has been made by the Judicature Act cannot be sustained. *Appeal.*
 It may be said that this is the first occasion on which the question *1901.*
 discussed in *Regina v. Beadle* (1) has come before this Court, and
 that we are at liberty to consider it for ourselves. I think, *In re*
 however, that it was decided according to the true construction *MADDEN'S*
 of the statute, and, even if I felt some doubt, I should decline *ESTATE.*
 to alter what has been so long accepted as law. *Holmes, L.J.*

I may add, to prevent misapprehension, that it seems to be now settled that in certain proceedings the Crown, although it cannot be ordered to pay costs, may be awarded costs by virtue of a well-known rule of equity.

Solicitors for the petitioners: *S. C. M'Cormick.*

Solicitors for the Commissioners of Woods and Forests:
Hallowes & Hamilton.

R. D. M.

IN THE MATTER OF A CONTRACT FOR SALE BETWEEN *M. R.*
 ELIZABETH WARD AND THOMAS JORDAN, AND *1901.*
 IN THE MATTER OF THE VENDOR AND PURCHASER *Nov. 18, 29.*
 ACT, 1874. *Dec. 3.*

(1901. No. 405.)

*Vendor and Purchaser—Licensed house—Conviction recorded on license—
 Omission to disclose—Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 31).*

On a sale of a public house with a license attached, the non-disclosure by the vendor of the fact that one conviction has been indorsed on the license is not a material omission which entitles the purchaser to refuse to complete the sale.

ADJOURNED SUMMONS.

This was an application on behalf of Thomas Jordan, the purchaser of a licensed public house at Warrenpoint, in the Co. Down, for a declaration that a good title had not been shown to the premises, and that the contract was not binding on him, and for a

(1) 7 El. & Bl. 492.

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return of the deposit. The facts of the case are as follows:— Premises in the town of Warrenpoint, in the county of Down, held from year to year, were put up for sale by auction on October 2, 1901, together with the publican's license attached to the premises, and the goodwill and interest of the tenant, Elizabeth Ward, in the business of a licensed publican carried on therein, subject to conditions of sale, and were purchased by Thomas Jordan for the sum of £700, of which a deposit of £175 was paid by him. The conditions of sale provided that on the completion of the purchase the original license certificate should be handed over duly indorsed. There was the usual condition that any error, misstatement, or omission should not annul the sale, or be a ground for any abatement or compensation. After the sale the purchaser learned that on March 6th, 1900, the vendor had been fined for an offence against the licensing laws, namely, for permitting drunkenness and riotous conduct to take place on the premises, and that this conviction had been indorsed on the license. The purchaser thereupon contended that the concealment of this fact by the vendor was such a material circumstance as to entitle him to refuse to complete the sale, and refused to complete, and asked for a return of his deposit. The vendor denied that there was any concealment, and contended that the matter referred to was not such a material circumstance as to entitle the purchaser to refuse to complete, and accordingly declined to return the deposit. This summons was taken out by the purchaser to have the question determined. An affidavit was made by the purchaser stating that he was entirely unaware of the indorsement of the conviction when he purchased the premises, and that if he had been aware of it at the time he would not have become the purchaser. An affidavit was made by the solicitor for the vendor that he was aware of the conviction having been indorsed on the license in March, 1900, but that the non-disclosure was innocent and unintentional on his part, and on that of the vendor, and that he would have disclosed it had he deemed it material. He did not think that it was such a material circumstance as would affect the bidding or cause any intending purchaser to decline to bid. He added that the license had been twice renewed since the conviction was indorsed on it.

Hume, K.C., and Williamson, for the purchaser.

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S. L. Brown, K.C., and Cusack, for the vendor.

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THE MASTER OF THE ROLLS:—

Dec. 3.

This is a summons by Thomas Jordan, purchaser, against Elizabeth Ward, vendor, asking for a declaration that the purchaser's objection No. 4 to the title has not been sufficiently answered, that a good title has not been shown, that the contract is (therefore) not binding on the purchaser, and for a return of £175, amount of the deposit.

The contract bears date the 2nd October, 1901, and the subject-matter of the sale, which was in consideration of £700, was the interest of the vendor in the premises occupied by her in the Square, Warrenpoint, known as the "Railway Saloon," held as a tenancy from year to year, under the Great Northern Railway Company, under agreement dated 25th May, 1898, subject to the rent thereby reserved, and the clauses and conditions therein contained; also the goodwill and interest of the vendor in the business of a publican, carried on in the said premises, and in the publican's license thereto attached.

The question before me is wholly conversant with the license, without which the rest of the property would be of little or no value. The 13th condition of sale provides that on the completion of the purchase the vendor shall hand to the purchaser the original license certificate duly indorsed. There is no mention of any special circumstance connected with the license.

On examining the documents the purchaser discovered that the license was indorsed with a conviction against the vendor by the Justices of the Petty Sessions District of Warrenpoint, dated 6th March, 1900, for an offence thus stated—that she being a licensed person did, on the 19th February, 1900, at Warrenpoint, permit drunkenness and violent and quarrelsome and riotous conduct to take place in her licensed premises (being the licensed house in question) contrary to the statute.

Accordingly, the purchaser's solicitor in his 4th requisition says: "The purchaser has learned that vendor was fined (and he gives particulars) and that the conviction was indorsed on the

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license. The purchaser relies on this as a concealment of a material fact and calls for a return of his deposit." The vendor's solicitor replied that there was no concealment, that the matter referred to was not such a material circumstance as entitled the purchaser to refuse to complete, and that the deposit would not be returned, but that the sale must be completed.

I am satisfied that the non-disclosure of the conviction and indorsement of it was not intentional concealment, and was certainly not actually fraudulent. The vendor's solicitor has entirely denied this in his affidavit, and has explained that it happened solely because it did not occur to him that the conviction was a material circumstance. The question really is whether it was or not. In considering it, it is to be noted that no other conviction appears on the license, and that the license was admittedly first granted after the passing of the Licensing Act, 1872.

Fraudulent concealment is, as I have said, out of the case. Further, the contract of sale was for the sale of the "vendor's interest in" the license—and she could only sell what she had. Still the omission to disclose a material circumstance, affecting the value of the property, known to the vendor and not known to the purchaser, relating to the greater part of that for which the large sum of £700 was to be paid, would in this Court entitle the purchaser to relief. When I heard the case in Chamber I thought the indorsement was a circumstance of that character. I thought the conviction was one step towards forfeiture. I am now satisfied that I was wrong for the following reasons:—

The 30th section of the Licensing Act, 1872, provides: "If any licensed person, on whose license two convictions for offences committed by him against this Act has been recorded, is convicted of any offence which is by this Act directed to be recorded on his license, the following consequences shall ensue, that is to say—

1. The license of such person shall be forfeited, and he shall be disqualified for a term of five years from the date of such third conviction from holding any license; and

2. The premises in respect of which his license was granted shall, unless the Court having cognizance of the case in its discretion thinks fit otherwise to order, be disqualified from receiving any

license for a term of two years from the date of such third conviction." Then follows a proviso on which nothing turns. This section only applies to repeated convictions against the same licensed person, and as there is only one conviction against Mrs. Ward it does not apply.

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The 31st section, described in the margin of the statute as "disqualification of premises," is as follows:—

"The following additional provisions shall be enacted with respect only to convictions of persons who may hereafter become licensed in respect of premises, and shall not apply to a conviction of any person licensed for any premises at the passing of this Act so long as he is licensed in respect of the said premises; viz.,

1. The second and every subsequent conviction recorded on the license of any one such person shall also be recorded in the register of licenses against the premises.

2. When four convictions (whether of the same or of different licensed persons) have within five years been so recorded against premises, those premises shall during one year be disqualified for the purposes of this Act.

3. If the licenses of two such persons licensed in respect of the same premises are forfeited within any period of two years, the premises shall be disqualified for one year from the date of the last forfeiture."

The first sub-section attaches no consequences to a first or single conviction, which is supposed to be adequately dealt with by its own penalty. But a second conviction is "also" to be recorded in the register of licenses: and the purchaser's contention here is that, since under the second sub-section the recording of four convictions within five years will disqualify the premises for a year, he is in a worse position starting with one conviction against the license than if it were "clean," because the first conviction against himself would then have to be recorded, whereas in the case of a "clean" license it would not. In other words, he says that in the present case four convictions would disqualify the premises—while otherwise four convictions would still leave his license intact. It is no answer to this (if it be the law) to say that he can avoid being convicted at all if he conducts his business

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properly. A licensed person is often punished for the acts of others, which he may not be able to prevent.

But the real answer is that the conviction of Mrs. Ward, which I am now dealing with, cannot affect Jordan under this section at all. The second and subsequent convictions recorded on the license must be "convictions on the license of any one such person." Mr. Hume and Mr. Williamson contended that the license of Mrs. Ward becomes when transferred to Mr. Jordan his license; that if he were convicted once, two convictions would then appear recorded on his license, with the statutory consequences. But this interpretation ignores the word "one"—which cannot apply to sole ownership (for only one person at a time can be licensed for the same premises), and must refer to one and the same person as holder of the license and convicted a second or third time. And this is made clear by the use of the word "also," which relates back to the 30th section, under which the convictions which are by the 31st section "*also*" to be recorded against premises, must necessarily be convictions of the same licensed person. That is, if a licensed person be twice convicted, and thus shall have his license indorsed and so incur forfeiture and disqualification, the premises shall "*also*" be affected by a record against them under section 31. This is made more clear by sub-section 3, which deals not with *one* such person, but two such persons licensed in respect of the same premises, which must mean two in succession. If this be not so, the distinction in the wording of the 1st and 3rd sub-section would be unmeaning.

Thus, the purchaser here cannot be personally affected under section 30 by the existing conviction: and no record can be made against the premises under section 31 till he has been himself twice convicted. In other words, the indorsement which is on Mrs. Ward's license will not prejudice him under either.

I need not do more than say, as to another argument of Mr. Williamson, that the conviction in no way concerns the suitability of the premises or their goodwill: and that though the purchaser is entitled to what has been termed a clean license, that which he gets will in his hands be clean, and it will be for him to keep it so—just as if no conviction whatever appeared upon it. The order in Chambers will be discharged: and the

summons dismissed, the Judge being of opinion that the purchaser's fourth objection has been sufficiently answered, and that a good title has been shown pursuant to the conditions of sale. The purchaser is to pay the costs, except the costs of the argument in Chambers, which are to be borne by the parties respectively.

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Solicitor for the purchaser: *Hanratty.*

Solicitor for the vendor: *W. Johnson.*

W. L.

DOWLING v. DOWLING.

(1901. No. 830.)

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Nov. 11.

Will—Construction—Absolute gift—Superadded words—Directions as to investment for certain purposes—Motive of gift—Trust.

A testator, after certain legacies, directed the balance of the purchase-money, realized by the sale of portion of his freehold property, to be equally divided among his four sons (of whom J. was one). He then provided as follows:—
“I direct my executors to invest the share of my said son J. in the purchase of a good, substantial tenement house in a good neighbourhood (having first had same examined by an architect), where my said son and family may enjoy apartments in same free of rent, and that he may have, after the payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof.”

Held, that there was a gift of an absolute interest to J., and that there was no trust created in favour of J.'s children (1).

ORIGINATING SUMMONS.

By his will, dated February 4, 1901, Joseph Dowling, after directing the sale of portion of his real estate by his executors and trustees at such time and in such manner as they should consider expedient, and the payment out of the proceeds of the sale of certain legacies and bequests, provided as follows:—
“I direct the balance of the purchase-money realized by the

(1) Cf. *In re Bourke's Trusts*, 27 L. R. Ir. 572.—[REP.]

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sale of my property in New Bride-street aforesaid to be equally divided between my four sons, Philip, Joseph, Michael, and James. I direct my executors to invest the share of my said son Joseph in the purchase of a good, substantial tenement house in a good neighbourhood (having first had same examined by an architect), where my said son and family may enjoy apartments in same, free of rent, and that he may have, after payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof. I empower my executors to make any slight alterations they may consider expedient in carrying out the provisions of this my will. I bequeath to my son James my house and premises, 16, Parnell-place, which I now occupy, as a residence for himself and family, subject to the rent and rates I pay for the same." Testator appointed his sons, Michael and James, executors and trustees of his will. He died 11th March, 1901, and probate of his will was granted to his executors on the 29th May of same year. The executors as plaintiffs issued a summons asking for the determination under Order LV., Rule 4, of the following question (amongst others) as to what was the effect of the bequest to the defendant Joseph Dowling of one-fourth of the balance (after payment of debts and legacies) of the proceeds of the sale of the real property directed to be converted into money, and as to whether the family of the defendant Joseph Dowling took any beneficial interest in said bequest.

D. J. O'Brien, for the plaintiffs.

Herbert Wilson, for Joseph Dowling :—

On the construction of this will Joseph Dowling is absolutely entitled, and there is no trust created in favour of his children. The present case comes within the principle applicable to that class of cases in which where property has been given absolutely to a parent in the first instance with superadded words of direction, as regards the support of children, it has been held that no trust is created. See *Jarman on Wills*, p. 374, and the

cases there referred to. *Thorp v. Owen* (1) is a case which strongly resembles the present. The devise in that case was to the widow of testator for the purpose of the support of herself and children, and it was decided that these last words merely indicated the reason or motive for making the gift, and that the widow took an absolute interest for her life. Joseph is the sole object of the trust in this case. The reason of the gift is expressed by testator, but the gift is an absolute one in favour of Joseph. See also *Ryan v. Keogh* (2).

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Oulton, for the children of Joseph Dowling :—

There is clearly a trust created in favour of the children of Joseph Dowling as well as himself. The scheme of the will is inconsistent with an absolute gift of one-fourth share of the proceeds of sale to Joseph. The direction is to *invest* in the purchase of a house, and the assignment of the house is to be taken in the name of the executors, who alone are “legally to possess same and the disposition thereof.” There is no direct gift to him. “To be equally divided” is an ambiguous expression, and means here that the property was to be divided into four shares. The object of the gift was to enable Joseph and his children to have a place to live in and some means of support. It was not a gift to him, pointing out as a motive for the gift that he should have the means of supporting himself and his children.

In *Thorp v. Owen* (1) there was a direct gift to the devisee, and the testator expressly stated the reason of that gift. He says: “I give the above devise to my wife that she may support herself and her children according to her discretion and for that purpose.” Here the responsibility is on the executors. There are to be trustees with control over the fund and its investment in house property. The appointment of trustees, as in this will, is altogether inconsistent with the construction that Joseph is to take absolutely.

Ryan v. Keogh (2) has no application. In that case there was only one object of the trust, viz. the testator’s

(1) 2 Hare, 607.

(2) Ir. Rep. 4 Eq. 357.

M. K. daughter. The gift was to "assist in her support," and the
 1901. consequences of the execution of this trust was to aid her in the
 DOWLING clothing and education of her children. See observations of
 v. Christian, L.J., pp. 378, 379.
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There is a gift of one-fourth of the money realized by the sale of the testator's property in Bride-street to Joseph in words which amount to an absolute gift. Then there is a gift to the executors which is something added on to the absolute gift. The testator says : "I direct my executors to invest the share of my said son Joseph in the purchase of a good, substantial tenement house in a good neighbourhood (having first had same examined by an architect), where my said son and family may enjoy apartments in same, free of rent, and that he, 'that is Joseph,' may have, after payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof."

Now the latter part of the gift is repugnant to the first part ; but at the same time it may be used as indicating what was the view the testator had in his mind ; and though the executors are to purchase the house, and have it examined, and pay the rent, the surplus income is to go to Joseph towards the support of himself and family. Apart from any authority, if I were at liberty to conjecture as to how matters stood, and as to what the testator intended to do, it was this. The old gentleman apparently thought he had good ground for suspicion as to Joseph's behaviour. He does not make him an executor. It is plain he wanted to give him the property, but to retain a control over him and it. He does not think that the direction as to residence controls the absolute gift, because in another context he bequeaths to his son James his house "as a residence for himself and family." That does not mean that he was not to be able (for instance) to sell it. He was to have it as a residence.

Then there is, first, an absolute gift to Joseph; and there is, secondly, an attempt to cut it down by giving a control over it to the executors in order to prevent him making ducks and drakes of the property. He gives one-fourth to him with a direction that it is to be enjoyed in a particular way. This is only an indication of the intention or motive with which the gift was made; and such indications, when the object is personal to the donee, do not constitute trusts. The effect is, in my opinion, that there is an absolute gift to Joseph.

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Solicitors for plaintiffs: *Gerrard & Co.*

Solicitors for Joseph Dowling: *Larkin & Co.*

Solicitors for the children of Joseph Dowling: *Roe & Co.*

R. W. L.

IN RE MITCHELL AND M'ELHINNEY'S CONTRACT.
(1901. No. 923.)

M. R.
1901.

Nov. 25.

Vendor and purchaser—Ownership not registered—Conditions of sale—Condition precluding purchaser from objecting by reason of non-registration—Validity of contract—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), sects. 22, 25, 29.

In a contract by a vendor for the sale of land, subject to the compulsory provisions of the Local Registration of Title Act, 1891, but unregistered, a condition of sale precluding the purchaser from requiring registration is binding on him.

The purchaser has power to register the title himself.

SUMMONS under Vendor and Purchaser Act, 1874.

By vesting order dated the 15th April, 1889, under the Purchase of Land (Ireland) Act, 1885, and the Land Law (Ireland) Act, 1887, certain lands and premises, then in the occupation of Rebecca Gourley as tenant, were vested in her as purchaser in fee-simple, subject to and charged with repayment to the Irish Land Commission of a sum of £1250 (advanced to her as

M. R. purchase-money), with interest thereon, by a terminable annuity
 1901. for a period of forty-nine years.

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 AND
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 NEY'S
 CONTRACT.

By her will, dated the 27th June, 1898, Rebecca Gourley devised and bequeathed all her real and personal property unto her sister Mary Mitchell, wife of the Rev. Robert Mitchell, absolutely for her sole and separate use and benefit, and appointed Mary Mitchell sole executrix.

Rebecca Gourley died March 3, 1900, and probate of her will was granted to Mary Mitchell on September 18 of the same year.

On September 10, 1901, Mary Mitchell as vendor sold the lands and premises comprised in the vesting order of the 15th April, 1889, to Thomas M'Elhinney at the price of £900, subject to conditions of sale.

The seventh condition of sale was as follows:—"The purchaser shall admit that at the date of the said vesting order the said Rebecca Gourley, the testatrix named in the short abstract of title prefixed to these conditions, was absolutely entitled in her own right to the tenant's interest in the hereditaments and premises comprised in said vesting order, and shall not make any objection or requisition in respect of the prior title."

Condition eleven provided:—"The title to the premises has not been registered under the Local Registration of Title (Ireland) Act, 1891, but no objection or requisition shall be made on account of such non-registration of the title, and the purchaser shall not require the vendor to register the title under the said Act."

The purchaser required the vendor to register the title, and offered to pay the costs of same when completed. The vendor refused to comply with this requisition.

On 9th November, 1901, the purchaser issued a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the vendor was bound to register her title under the Local Registration of Title (Ireland) Act, 1891, previous to the completion of the purchase, and that a good title had not been shown, and that the vendor should pay the costs of the application.

Drummond, K.C. (with him *J. W. Bird*), in support of the application :—

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The title of *Mrs. Gourley* has never been registered, and, therefore, in consequence of the 25th section of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), no title passed. Registration was necessary to perfect her title. Her executrix and devisee agreed to sell the fee to the purchaser, but she has no estate in the lands until registration, and is not in a position to convey. Property in land subject to registration under the Act does not pass to a purchaser until registration : *Torish v. Orr* (1) ; *Belfast and Northern Counties Railway, Ex parte Gilmore* (2) ; *Re Keogh and Kettle* (3).

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Consequently condition eleven is repugnant to the contract and void, for the present purchaser has no power himself to make the title good by registration. He cannot know what are the pre-existing equities or what burdens are on the land, and he is not in a position to fulfil the requirements of sect. 29 of the Act.

If the vendor took steps to register the title, she must satisfy the registering authority that it came to *Mrs. Gourley* without being subject to burdens, and that she was absolutely entitled to the tenant's interest. The vendor would thus be bound to disclose the prior title. Consequently the purchaser is, notwithstanding condition seven, entitled to object in respect of the prior title. He is not precluded from showing that the title is bad : *In re Davys* (4).

In re Furlong and Bogan's Contract (5) is distinguishable from the present case, because there the vendor had done everything he could to ensure registration. The condition in that case was framed to preclude objection on account of delay in registration. In the present case the vendor declines to register on any conditions. The only question for decision in that case was as to whether before the vendor had had his registration completed he could contract for the sale of his interest in the land.

The principle to be applied is the same as if this were a suit for specific performance. Specific performance would be refused in this case : *Scott v. Alvarez* (6).

(1) [1894] 2 I. R. 381.

4) 17 L. R. Ir. 334.

(2) [1895] 1 I. R. 297.

(5) 31 L. R. Ir. 191.

(3) [1896] 1 I. R. 285.

(6) [1895] 2 Ch. 603.

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Wylie, K.C. (with him *Osborne*), for the vendor:—

Under the contract the purchaser has no completed title until registration. He has, however, a right incapable of being defeated, and by registration it becomes an absolute estate. He has power to register the title himself, and so perfect it. The cases decide that the vendor, as devisee and executrix of the purchasing tenant (*Mrs. Gourley*), can transmit to the purchaser the equity to register, and so complete the title. The condition in the present case is not so stringent as that in *In re Furlong and Bogan's Contract* (1), where the Vice-Chancellor said that the vendor had an "inchoate right incapable of being defeated, and only waiting for an official duty to be performed to become an absolute estate."

The note added to Form 9 in schedule to rules under the Act shows that the purchaser can register title. See *Browning and Glover on Local Registration of Title in Ireland*, 228.

THE MASTER OF THE ROLLS:—

The question in this case is a simple one. I am asked to treat Number eleven of the conditions of sale as a nullity, and to strike it out. The contract is not impeached on any ground going further than that.

Condition Number seven provides as follows:—"The purchaser shall admit that at the date of the said vesting order the said Rebecca Gourley, the testatrix named in the short abstract of title prefixed to these conditions, was absolutely entitled in her own right to the tenant's interest in the hereditaments and premises comprised in said vesting order, and shall not make any objection or requisition in respect of the prior title."

Apart from the Local Registration of Title Act, a condition of this sort would be binding unless it were shown that it was introduced for the purpose of concealing some known defect of title. No doubt a purchaser is often placed at a disadvantage where the condition is one which he does not understand, and the effect of which he cannot foresee: and when he buys at an

(1) 31 L. R. Ir. 191.

auction he often does so without legal advice. In this case the sale was not by auction; and it is not suggested that the purchaser was misled or deceived in any way as to the effect of the condition. The condition is commonly and quite properly introduced into contracts where the vendor wishes to guard against responsibility for unknown defects in title or difficulties in removing them.

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Then comes condition Number eleven which provides:—"The title to the premises has not been registered under the Local Registration of Title (Ireland) Act, 1891; but no objection or requisition shall be made on account of such non-registration of the title, and the purchaser shall not require the vendor to register the title under the said Act."

The language of this condition is perfectly plain and clear. No one could have any difficulty in understanding the meaning of the words used. It is clear the purchaser understood that the vendor was not to be required to register the title. He now seeks to assert a right exactly contrary to that condition; and he can only do so by showing that it is a simple nullity. He does not suggest as matter of fact that he was misled or deceived: but his counsel says:—"The title of Mrs. Gourley was never registered. It was unregistered at her death. Her executrix, the vendor, never registered it. And he suggests that in consequence of the 25th section of the Local Registration of Title Act no title passed; and that, therefore, the condition rendered the whole contract void, and the purchaser could not himself make the title good by registration. And Mr. Drummond says, as regards condition eleven, that if the vendor registered the title he must satisfy the registrar that it came to Mrs. Gourley without being subject to burdens; and, further, that she was absolutely entitled to the tenant's interest in the hereditaments. He says the vendor is bound to disclose the prior title, and thus he would strike condition seven also out of the agreement as being inconsistent with this view. The result would be that, notwithstanding the seventh condition, the purchaser would be at liberty to object in respect of the prior title.

In my opinion the purchaser has power under the section to register the title himself. No doubt the registration authority

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might require the burdens on the hereditaments to be ascertained and specified. But it is not likely that he would. The exercise of that power would do the registrar no good. He is not to be paid for doing this; and it may be that he would not concern himself with it.

The purchaser has power himself to register the title conferred upon him by the vendor, who has apparently a perfectly good holding title. No doubt the registration will only relate to the sale to the purchaser, but that is the contract. The vendor will have to show that the title has not been lost or prejudiced since the date of the vesting order; and in my opinion is not bound to do that which the purchaser says he will not require him to do. Therefore the objection fails.

The purchaser, however, has shown his *bona fides* by offering to pay the costs of registration by the vendor. The vendor in this case is, as I hold, not bound to register, but if he is sincere in the expression of his belief that he has a good title, and that no adverse equities attach upon the old tenancy, I think he might very well have taken the purchaser's offer. On the whole, considering that this offer was made, I will not say anything about costs.

Solicitor for the vendor: *S. Morrison.*

Solicitor for the purchaser: *P. Gallagher.*

R. W. L.

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(1901. No. 116.)

May 1, 2, 18.

Ecclesiastical lease—Covenant to renew toties quoties—Purchase of fee by covenantor—Obligation to renew—Irish Church Act, 1869 (32 & 33 Vict. c. 42), sects. 12, 31, 34.

A lessee for twenty-one years of church lands, made by the Dean of C., made a sub-lease of part for a like term, with a covenant to renew *toties quoties*. The lessee had no right of renewal, but the lease was renewed by custom.

In the year 1878, after the passing of the Irish Church Act, 1869, the lessee named in the last renewal purchased the fee-simple of the lands from the Church Commissioners, pursuant to sect. 34 of the Irish Church Act. The sub-lessee was asked by the lessee to join in, and contribute to, the purchase. He declined, but afterwards claimed a renewal of his interest from the assignee of the purchaser:—

Held, that he was not entitled.

TRIAL OF ACTION.

This action was brought for a declaration that a conveyance of July 15th, 1878, from the Commissioners of Church Temporalities in Ireland to Persianna Barter, Matilda Jane Barter, and Mary Barter, of the fee-simple of part of the lands of Deanrock, in the county of Cork, was a graft on a lease of the 2nd July, 1784, from the Dean of Cork to Mary Breton for twenty-one years, and was subject to perpetual renewal of a sub-lease of part of the said lands of April 1st, 1793, from Eliza Breton to George Breton for twenty-one years with a *toties quoties* covenant for renewal at a peppercorn rent, and for consequential relief.

The facts of the case and the arguments of counsel sufficiently appear from the head note and judgment.

Healy, K.C., and *A. M. Sullivan*, for the plaintiff.

O'Connor, K.C., and *A. C. Meredith*, for the defendant.

The following authorities and statutes were referred to:—*Evans v. Walsh* (1); *Postlethwaite v. Leuthwaite* (2); *Stratton v. Murphy* (3);

(1) 2 Sch. & Lef. 519. (2) 2 J. & H. 237. (3) I. R. 1 Eq. 345.

- M. R.* *Kelly v. Kelly* (1); *M'Cracken v. M'Clelland* (2); *Lytle v. Fox* (3);
 1901. *Coey v. Pascoe* (4); *Hussey v. Domvile* (5); Co. Litt. (18th ed.),
BERNARD 290 *b*, note (1) xi.; 3 & 4 Will. 4 c. 37, ss. 128. 131, 142,
v. 146, 148-9, 151-2, 154-5, 160; 32 & 33 Vict. c. 42, ss. 12, 31,
HUNGERFORD 146, 148-9, 151-2, 154-5, 160; 32 & 33 Vict. c. 42, ss. 12, 31,
 34; Lyne on Church Leases, app. iii.; Todd's Irish Church Act,
 p. 73; Todd's Rights of Tenants under Irish Church Act,
 pp. 7, 25.

May 18.

THE MASTER OF THE ROLLS:—

The plaintiff, Emily E. Bernard, claims as representing the lessee's interest in a lease of 1st April, 1793, made by Eliza Breton to George Breton of certain premises, being part of the lands of Deanrock, or Carrigdecaning, in the county of Cork, for twenty-one years, with a covenant for renewal *toties quoties*, and since renewed—the last renewal bearing date 1st July, 1833. Whether she has the entire interest in the sub-lease or not is not clear. She has, however, a sufficient interest in it to entitle her to sue. The lease of 1793, containing a covenant by the lessor to renew *toties quoties*, was, of course, an under-lease. It was, in fact, a demise of part of the premises comprised in a superior lease of 2nd July, 1784, by the Dean of Cork to Mary Breton, which demised certain church lands of Deanrock for twenty-one years, but contained no covenant or agreement for any renewal. It was, in fact, however, from time to time renewed by successive Deans, the last renewal bearing date 15th February, 1871, from Dean Edwards to ladies named Barter. This head lease was at a substantial rent. The under lease of 1793 and its renewals reserved only a peppercorn rent and no fines. The covenant for renewal in it was in these words (I take them from the renewal of 1833): —“And it is further agreed that the said Martha Barter, her executors, administrators, and assigns, shall and will as often and at all times hereafter whensoever she or they shall renew their original lease of the premises of Carrigdecaning, and held by her under the Very Rev. Dean Burrowes (of which premises the demised

- (1) I. R. 8 Eq. 403.
 (2) I. R. 11 Eq. 172.
 (3) [1898] 1 I. R. 340.

- (4) [1899] 1 I. R. 125.
 (5) [1900] 1 I. R. 407.

is a part), or his successors the Deans of Cork, and upon any such renewal or renewals so obtained she or they shall perfect unto the said Mary Breton, her executors, administrators, or assigns, if demanded by her and them, a renewal or renewals of the hereby demised premises under the same covenants with these presents for so many years (save one) as shall be contained in such renewal, or new lease so to be made to the said Martha Barter, her heirs, executors, administrators, and assigns, it being the true intent and meaning of the covenants and of the parties hereto that the said Mary Breton, her executors, administrators, or assigns, shall always have an interest and term of years in the demised premises for so many years (save one) as the said Martha Barter's interest, or that of her executors, administrators, or assigns, shall continue and without any fine."

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No doubt, had nothing else occurred, the lease of 1793 would in all probability have continued to be renewed in due course, from time to time, by successive Deans of Cork; and the sub-lessees would then, by virtue of this covenant, have been entitled to take out renewals so long as that state of things continued.

But then came the Church Act of 1869. The last renewal of the head lease bears date, as I have said, the 15th February, 1871, and was for twenty-one years from the 29th September, 1870, which it was within the power of Dean Edwards to grant notwithstanding the Act; and as the Barters were bound to renew to the under-lessees, the latter, not being under any rent or liable to pay any renewal fine, must be regarded as in no worse position than if they had actually obtained a renewal. Then comes the transaction which has altered the positions of the parties and led to this suit. I must first, however, refer to two sections of the Church Act.

Section 12 is as follows:—(1) "On the first of January, 1871, save as hereinafter provided, all property, real or personal, belonging or in anywise appertaining to or appropriated to the use of any archbishopric, bishopric, benefice, or cathedral preferment, in or connected with the said Church, or belonging or in anywise appertaining to or appropriated to the use of any person as holding any such archbishopric, bishopric, benefice, or cathedral preferment, or belonging or in anywise appertaining to or appropriated

M. R. to the use of any cathedral corporation in Ireland as defined by
 1901. this Act, shall vest in the Commissioners as hereinafter men-
 BERNARD tioned." (2) "In the case of any houses, buildings, farms, lands,
 v. churches, burial grounds, or other corporeal hereditaments, to
 HUNGERFORD which, or to the rents and profits of which, any archbishop, bishop,
 or person holding such benefice, or cathedral preferment, as afore-
 said" (which would include a dean), "may be entitled, subject to
 the life interests of such archbishop, bishop, or person respectively ;
 and such last mentioned corporeal hereditaments shall, subject to
 the provision for commutation, hereinafter contained, continue in
 such archbishop, bishop, or person respectively, for their respective
 lives with the same powers, rights, and authorities, and in the
 same manner as if this Act had not passed." (3) "On the death
 or cessor of the interest of any archbishop or bishop aforesaid, the
 tenants then holding directly under any such archbishop or bishop,
 whose leases had been theretofore customarily renewable, shall have
 similar rights of renewal of their said leases, and the said Commis-
 sioners shall be under similar obligations and have similar powers and
 rights to renewal of their said leases, and the said Commissioners
 shall be under similar obligations and have similar powers and
 rights in relation to such renewals, and the rents and fines there-
 upon as the tenants of sees suppressed under statute 3 & 4 Wm. 4,
 c. 37, and as the Ecclesiastical Commissioners in regard thereto
 had and were under respectively, immediately before the passing
 of statute 23 & 24 Vict. c. 150 ; every application for any such
 renewal shall be made within one year from the death or cessor of
 the interest of such archbishop or bishop, and thereupon the Com-
 missioners shall once and for ever fix for the future the rent
 and periods of renewal and the fine to be paid thereupon, and
 in case of any difference in relation to such rent or fine the same
 shall be referred to arbitration as herein."

Section 34 is as follows:—"The Commissioners" (*i.e.* the Church Commissioners) "may at any time after the first of January, 1871, sell by public auction or private contract, or otherwise convert into money, any real or personal property vested in them by this Act, subject to the other provisions of this Act, and to the following conditions:—(5) They shall not sell to the public the fee-simple of any land which is held immediately from or under

the Commissioners by virtue of any lease or tenancy, until they have given notice to the lessee or tenant that they are willing to sell the fee-simple to him for a price to be named by the Commissioners in such notice, and such lessee or tenant has declined to accept their offer.”

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(7) “An owner shall be deemed to have declined to accept the offer of the Commissioners if he do not accept the same in writing, and pay or secure the purchase-money to the Commissioners within three months after the giving of such notice as aforesaid.”

“Any person purchasing from the Commissioners shall hold the lands purchased by him subject to all tenants rights of renewal to which the same were subject in the hands of the Commissioners at the time of such sale.”

Now, in the first place, sub-section 3, of section 12, does not apply to the case, because this is not a lease from a bishop or archbishop. Mr. Healy urged that the omission of the word dean is accidental, and that, if not, bishop or archbishop must be read to include dean. I think that neither hypothesis is tenable. There is no modern statute better drawn than the Church Act. I think hardly any so well drawn. The immediately preceding sub-section and the immediately succeeding sections show that the draughtsman was not incapable of appreciating the distinction between a dean and an archbishop; and the reference to the prelates is obviously occasioned by the terms of the Act of 3 & 4 Wm. 4, c. 37, dealing with suppressed dioceses. There is no mistake in the reference, nor is there any authority for holding that in an Act of Parliament dean means bishop or archbishop. Probably many deans would be glad if it were so.

Nevertheless, the Misses Barter, having got their renewal lease in 1871, were duly offered by the Church Commissioners, some time later, the option of purchasing the fee of the lands under section 34. They must either accept the offer, or be taken to have refused it. They did the former; and by deed of the 13th July, 1878, the Church Commissioners granted the lands to them in fee, in consideration of a cash payment of £500 and a mortgage for £1500. The plaintiff's contention is that this acquisition of the fee-simple by the Misses Barter entitles

M. R. her by virtue of the covenant in the lease of 1833 (or 1793)
 1901. to perpetual renewal of her interest without rent and fine.
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That the covenant does not in terms give such a right is, of course, clear. It is not a "renewal" of the original lease. It is a renewal for "so many years (save one) as shall be contained in such renewal." There could not be such a thing as a grant in fee-simple minus a year. "The interest" mentioned in the covenant cannot confer any larger rights than that which it purports to explain, viz. the *toties quoties* covenant.

But further, when the Misses Barter were offered the fee on terms by the Church Commissioners, they proposed to the plaintiff that she should join with them in securing the valuable interest offered—she contributing, of course, to the expense of it: and she positively and unequivocally refused to make any contribution whatever, or even to consider the question of contribution at all. This appears from the correspondence. On February 14, 1878, Mrs. Bernard wrote as follows:—

"Mrs. Bernard begs to inform Mrs. and the Misses Barter that she and her family, who are connected with the Carrigdecanig property, will in no way be a party with Mrs. and the Misses Barter in their intended purchase from the Church Commissioners of part of the lands of Carrigdecanig, County Cork."

On February 25, 1878, Mr. Corker wrote to Mr. Babington as follows:—

"DEAR BABINGTON,—Mrs. Bernard has just been with us, and fearing that the sum required from her for a grant of the reversion expectant on her fourteen years to run, might be too large, she has authorised us to offer her reversionary interest for sale to Mrs. Barter, and I, therefore, wish to know what sum your client would be satisfied to give for the same. Mrs. Bernard tells us that, during my absence lately in Dublin, she wrote a note to Mrs. Barter, which it would appear was written under some misapprehension, but at the same time she is willing to sell her reversionary interest. You are aware that the Commissioners at my request postponed the further consideration of the matter till March 1st. I shall, therefore, be glad to hear from you as soon as possible, in order that I may now communicate with the Commissioners to such effect as may be arranged upon."

Her position was that though willing to sell, she would not in any way join in the acquisition of the fee.

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Had the case been one turning upon the right of the defendant to have a contribution from the plaintiff, as if under the Church Temporalities Act, 3 & 4 Wm. 4, c. 37, sect. 152, I have no doubt that the plaintiff would have been obliged to contribute a very substantial sum, "in proportion to the value of . . . her respective estate or interest in the said lands and premises" (assessed as under that Act), for her interest was a valuable one; and under the formula given in Mr. Lyne's, I must call it bewildering book, the greater the interest in the sub-lease the higher was the contribution payable.

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How, then, even if the plaintiff had any rights analogous to those conferred by the Church Temporalities Act upon under-tenants, could she now claim to force herself upon the fee, having positively refused to do her part? But she had no such rights, for the Church Act gives her none. As matter of covenant, too, the plaintiff has no case. In *Lytle v. Fox*(1) the covenant was very different from the present, which is obviously confined to the simple function of a *toties quoties* covenant, "as often as I renew my lease I shall renew yours." I need not quote the judgments of the Court of Appeal in that case, as we are familiar with them; but the *ratio decidendi* is that one party agreed that as often as he obtained a renewal or new lease for any extended time, he would, etc. He did obtain a new lease (though not a renewal), and so the covenant applied. No lawyer at the Bar could frame a statement of claim applicable to the facts of the present case, and founded upon covenant simply, without changing the language of the obligation.

But then, and this is the main contention of the plaintiff, it is argued that there is an equity, apart from mere law, by virtue of which the plaintiff, being deprived of her remedy against the lease, can resort to the fee for perpetual renewal, because the owner of the head-lease has himself acquired the fee, as Mrs. and the Misses Barter did in 1878. That is in this case a hopeless contention. Under none of the great heads of

(1) [1898] 1 I. R. 340.

M. R. equity can this case range itself. Of trust I am unable to see
 1901. any evidence. There is no fiduciary relation (as the Vice-
 BERNARD Chancellor said in *Lytle v. Fox*) (1). But if there were any
 v. evidence of trusteeship, the plaintiff refused to accept the position
 HUNGERFORD which would flow from that relation. Of fraud there is no
 suggestion. It is urged that if, having granted the fee, and
 so by their own act having rendered a literal compliance with
 the covenant which bound them impossible, the Misses Barter
 refused to renew, they were acting in fraud of their covenant.
 But the underlessees always had notice of the necessary inherent
 infirmity of their title, since their lessor might never be able to
 renew, or might refuse to do so. If the Barters had arbitrarily
 declined to take out a renewal, it cannot be suggested that the
 plaintiff would have any right to compel them to do so, or even
 to damages against them. They were free to renew, if they
 could renew, or to let their lease run out and quit the premises,
 even if the Dean of Cork, or the Church Temporalities Commis-
 sioners, during his life and tenure, had implored them to accept a
 fresh lease.

But the plaintiff, when offered the chance of taking a benefit
 flowing from the position of his immediate lessors, in the pur-
 chase of a totally different estate, the fee-simple on terms to be
 arranged, positively declined to do so—all questions of an equity
 to compel them or their assignee, Mr. Hungerford, to give such a
 benefit now is absolutely unarguable—on the ground of any
 supposed equity, and *à fortiori* on the ground of any conceivable
 question of fraud. When, twenty years later, Mr. Hungerford
 offered them a grant upon terms, this offer likewise was refused.
 In the view I take of the case, however, he was not bound to
 make any such offer.

For the views of the Vice-Chancellor on this and other ques-
 tions, I have, as is well known, the highest respect. His decision
 in *Lytle v. Fox* (1) was affirmed by the Court of Appeal on grounds
 different from those on which he decided it. The Court of Appeal
 held that that case depended on the words of the covenant, and
 abstained from acquiescing in the reasoning on which he pro-

(1) [1898] 1 I. R. 340; 355.

ceeded. This leaves his judgment to be dealt with in cases to which it applies. But it has no application here. In *Lytle v. Fox* (1), the Vice-Chancellor said: "I think that the cases on this subject may be conveniently divided into two classes, namely, one of fiduciary relation and the other of contract. In the former, where a fiduciary relation exists between the parties, subsisting before and independently of the transaction in question, in these cases, the elementary principle of equity applies, that no person under a fiduciary obligation can be permitted to retain any advantage he may have acquired, directly or indirectly, in respect of such fiduciary relation. The other class depends on contract, and the doctrine of the Court applicable to them is, that when a person has entered into an agreement, such as that in the present case, and afterwards, by his own act, renders it impossible literally to perform such agreement, but can do so substantially out of his newly acquired estate or interest, he must make good his contract out of the acquired estate."

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It was the case of a voluntary purchase of a superior lease in the Landed Estates Court. In the present instance the statute, which provides for the preservation of the interests of certain classes of sub-tenants in a particular way and within definite limits of time, makes no provision for the class of sub-tenants of which the plaintiff is one, and draws no distinction in sect. 34 between the effect of a purchase by one who has a right of pre-emption and one by a member of the public, when once the sale is completed.

But here the purchase of the fee is not the voluntary or spontaneous act of the Barbers. It is really the result of the Church Act, which in a manner forced it upon them; and so far from seeking to deprive the plaintiff of anything which she is entitled to, they offered her the opportunity of participating in a benefit which could not have been claimed by covenant, and which she with advice refused to accept. They had then to provide the whole of the money, and they and the present defendant in turn did so provide it. To talk of an equity now subsisting under such circumstances is to use language which I do not even understand.

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In my opinion the claim founded on any right to renewal is itself unsustainable, and as to it the action must be dismissed.

There is another question in the case of a different character.

The lease of 1784 became vested in one Eliza Breton, who by her will, made in 1826, devised to Emily Breton a perpetual annuity of £10 (late Irish currency), charged upon the whole of the lands. Emily Breton, by her will of 1826, devised this annuity to the plaintiff for life, who has enjoyed it till recently. Mr. Hungerford's advisers have disputed the plaintiff's right to this annuity, and it is denied in the statement of defence. He bought, however, expressly subject to it during her life; and although the plaintiff was not a party to his conveyance, yet all he bought was not the lands free from incumbrances, but the lands subject to two incumbrances, viz.: the mortgage to the Church Temporalities Commissioners and this annuity of £9 4s. 7d. to plaintiff during her life. At the bar, his liability to this charge was not energetically disputed. He really bought what was left after payment of the mortgage and annuity. Indeed, before action he offered to secure to plaintiff an annuity of £20 for her life in full of all her rights; but this was refused. I must, however, declare her entitled to this annual sum of £10, late Irish currency, for life, and to the arrears since its payment was stopped.

Solicitor for the plaintiff: *Maurice Healy.*

Solicitors for the defendant: *O'Keeffe & Lynch.*

W. L.

BEALE v. BRAGG.

(1894. No. 124.)

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Dec. 10.

Practice—Order for sale of land—Appointment of person to convey—Form of order—Trustee Act, 1893 (56 & 57 Vict. c. 53) sect. 33.

Form of order and mode of execution of conveyance where the Court orders a sale of land and a person entitled, being a party to the proceeding, refuses to execute the deed.

By the judgment on further consideration, dated the 2nd November, 1899, it was ordered that certain hereditaments should be sold, that the sales should be retained in this Court, and that all necessary parties should join in executing the deeds of assignment to the purchasers.

The premises were sold in two lots, and the purchasers required the plaintiff to be a party to the deeds of assignment.

The deeds were accordingly so prepared, but the plaintiff refused to execute them. They had been previously executed by ten other persons.

On the 12th November, 1901, on the application of the defendants an order was pronounced at Chambers appointing one of the defendants' solicitors to convey.

The order as drawn up ran :—"The Judge doth, pursuant to the provisions of the Trustee Act, 1893, appoint the said Alfred E. Goodbody, of No. 30, College-green, Dublin, solicitor, to convey to the respective purchasers the lands and premises comprised in lots 1 and 2 sold in this action pursuant to the judgment dated the 2nd day of November, 1899, for all the estate, right, title, and interest of the said plaintiff, Mary Anne Beale, therein."

The defendants proposed that Mr. Goodbody should execute the deeds already prepared, and that the fact of his doing so for the plaintiff should be stated in the attestation clause. The purchasers objected to this on the ground that it would not be a com-

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pliance with the order or with section 33 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (1).

This was an application by the defendants that Mr. Goodbody be at liberty to execute the deeds in the name of the plaintiff or his own name as the Court might direct, or for a vesting order.

Pim, for the defendant, in support of the application pointed out that, although the English practice appeared to be that the person appointed should himself convey, and in his own name, there were two cogent reasons why he should execute a conveyance by the person refusing, and in the name of the latter—1, the refusal was generally after the conveyance had been prepared and engrossed, and sometimes (as in the present case) after it had been executed by other persons; 2, great difficulty or inconvenience would arise with respect to the registration of a deed when the person conveying had no estate or interest in the property. He referred to *Ex parte Foley* (2) and to a Rolls Order dated the 22nd April, 1901, in a case of *Martin v. Martin* (1896, No. 166), by which a person was appointed to convey “in the name of the said Claudius Martin and Michael P. Martin (infant defendants) to the said Connell Cannon, the purchaser thereof, &c.”

H. D. Conner, *K.C.*, for the purchasers, stated that if the order in the present case had been in the same form as that in *Martin v. Martin* (*supra*) no difficulty would have been raised, and that the purchasers had no objection to what was now asked for. He pointed out, however, that the jurisdiction under section 33 arose from the fact that the party to the action or proceeding was under the Act to be deemed to be, or might be declared to be, a trustee, and that the Court had power to make a vesting order (sections 30, 31); that the power given by section 33 was to appoint a person “to convey” the land, and that it declared that “a con-

(1) SECT. 33.—In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

(2) 8 Sim. 395.

veyance by that person " should have the same effect as a vesting order; that *Ex parte Foley* (1) had not been followed; and that in England there was now an express statutory provision (Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61 s. 14), enabling the Court to make such an order as was now asked for.

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THE VICE-CHANCELLOR made an order that the order of the 12th November, 1901, be amended "by appointing Alfred E. Goodbody therein-mentioned to convey in the name of Mary Anne Beale, the plaintiff, to the respective purchasers the lands and premises comprised in lots 1 and 2 sold in this action for all the estate, right, title, and interest of the said plaintiff, Mary Anne Beale, therein." (2)

Solicitors for the defendants: *Goodbody & Tisdall*.

Solicitors for the purchasers: *Hall and Hayes*.

D. M'C. M.

(1) 8 Sim. 395.

(2) See *Derham v. Kiernan* (I. R. 5 Eq. 217), a case under sect. 20 of the Trustee Act, 1850 (13 & 14 Vict. c. 60), the material words of which are:—"To make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act."—[REP.]

V.-C. IN RE THE RENEWABLE LEASEHOLD CONVERSION
1902. ACT; EX PARTE O'CONNOR.

Jan. 24.

(1901. No. 124.)

Practice—Attachment of debts.

Order made *ex parte* attaching certain judgments, obtained in the King's Bench Division by the petitioner in this matter, to satisfy an order against him for payment of the respondent's costs in the said matter.

EX PARTE MOTION.

By an order of the Court in this matter, dated the 12th June, 1901, the respondent was declared entitled to recover the amount of her costs against the petitioner, Valentine O'Connor, when taxed. Said costs, when taxed, amounted to £128, no portion of which had been paid.

It appeared that the petitioner had obtained the following judgments in the King's Bench Division, viz. a judgment against Andrew Hally, of Lisnamuck, Cahir, in the county of Tipperary, dated 13th November, 1901, for £61 11s. 7d.; a judgment against Patrick Hally, of Lisnamuck, aforesaid, for £53 12s. 2d., dated the 13th November, 1901; a judgment against Thomas Hally, of Lisnamuck, aforesaid, for £51 3s. 4d.; and a judgment against John Morrissey, of Thomastown, Cahir, for £162 9s. 2d., dated the 13th November, 1901. Said judgments were still unsatisfied.

Chaytor, for the respondent, applied for an order that the judgments, obtained by the petitioner in the King's Bench Division, should stand attached to satisfy the order for costs, obtained by the respondent in the present matter against the petitioner. He relied on *Fitzpatrick v. Waring* (1); and for the form of order referred to *Sparks v. Younge* (2).

THE VICE-CHANCELLOR made the order.

Solicitor for the applicant: *O'Meara*.

J. MAC M.

(1) 13 L. R. I. 2.

(2) 8 I. C. L. R. 251.

IN RE HARBISON, DECEASED; MORRIS v. LARKIN.

(1901. No. 504.)

M. R.

1901.

Dec. 9.

Will—Construction—Real estate—Devise—Trust—Discretionary power—Charitable or other purpose—Death within three months—Devisee taking beneficially—Uncertainty.

A testatrix, entitled to real estate, by her will provided as follows:—
“I give and bequeath my dwelling-house, office-house, yard, and garden to the Rev. T. L., parish priest, for a Roman Catholic school, or for whatever other purpose he pleases.” Testatrix died within three months of the date of the execution of her will:—

Held, that there was no trust created for a charitable purpose, and that the Rev. T. L. was entitled beneficially to the gift.

ORIGINATING SUMMONS.

By her will dated 31st October, 1896, Lucy Harbison, of Moneymore, in the county of Londonderry, after appointing executors and directing the payment of debts, &c., provided as follows:—“I give and bequeath my dwelling-house, office-house, yard, and garden to the Rev. Thomas Larkin, P.P., for a Roman Catholic school or for whatever other purpose he pleases. I give my land and household effects to Mrs. Elizabeth Morris subject to the provisions of this my will.”

The testatrix died 13th December, 1896. The executors named in the will renounced their right to probate, and on 5th January, 1900, letters of administration, with the will annexed of the personal estate of Lucy Harbison, were granted to the plaintiff Elizabeth Morris. At the time of her death Lucy Harbison resided in the house and premises referred to in her will which were held by her in fee-simple free of rent. In addition to these premises the testatrix at the time of her death was the owner in fee of a farm of land of four acres, which with the dwelling-house and premises constituted all the property which belonged to her.

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The plaintiff issued an originating summons dated 28th June, 1900, asking for the determination of the question as to who was entitled to the premises described in the will of Lucy Harbison, deceased, as "my dwelling-house, office-house, yard, and garden, and demised by her will to the Rev. Thomas Larkin for a Roman Catholic school or for whatever other purpose he pleases."

Bartley, for the plaintiff:—

The gift to the Rev. Mr. Larkin was clearly intended to be a gift for a charitable purpose, and is impressed with the character of a trust. It fails not only by reason of the death of the testatrix within three months from the date of the execution of the will but also on the ground of uncertainty. In *Leavers v. Clayton* (1) executors were directed to apply a residue to any charitable or benevolent purpose they might agree upon, and it was held that the gift failed because the direction to the executors was indefinite and inoperative. In *Boyle v. Boyle* (2) the gift was to the executors for works of charity "such as masses for the repose of my soul and whatever else they may judge most charitable"; and it was held that the trust was indefinite and that the gift failed for uncertainty. In *Ellis v. Selby* (3) the testator gave certain property to his trustees "for such charitable or other purposes as they should think fit without being accountable to any person"; and it was held that the gift failed for uncertainty. The case of *Harris v. De Pasquier* (4), following *James v. Shannon* (5), is conclusive on this point. In that case the testator gave certain property to his trustees for certain charities, and also gave "to the Lord Mayor of Dublin for the time being £100 for such objects as he shall deem most deserving"; and it was held that the Lord Mayor did not take beneficially, and that the gift failed. If the gift to the Rev. Mr. Larkin fails, then the gift to the plaintiff of "my land and household effects" captures the dwelling-house, office-house, and garden, in occupation of testatrix at the time of her death.

(1) 8 Ch. D. 584.

(4) 20 W. R. 668.

(2) 1. R. 11 Eq. 433.

(5) 1. R. 2 Eq. 118.

(3) 7 Sim. 352.

Gaussen, for the defendant, the Rev. Thomas Larkin :—

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This is a devise to the defendant for a particular object, together with an alternative gift which conveys the beneficial interest and entitles him to claim the property beneficially. The first gift having failed, the defendant is entitled for his own use, if he so chooses, though his desire will be to devote the property to some such object as the testatrix wished. The authorities relied on by the plaintiff were cases where there was attached to the alternative gift some qualification indicating that a personal beneficial enjoyment of the property was contrary to the intention of the testator. Here the disposal of the property is left to the unfettered discretion of the defendant.

As to the meaning to be attached to words similar to those used in the present will, see *Paice v. Archbishop of Canterbury* (1).

The following cases were also referred to :— *Williams v. Ker-shaw* (2) ; *Morice v. Bishop of Durham* (3) ; *Kendall v. Granger* (4) ; *Buckle v. Bristow* (5) ; *Palmer v. Flower* (6) ; *Gibbs v. Rumsey* (7) ; *M'Cormick v. Grogan* (8).

Glover, for the heir-at-law :—

The gift in question must be construed as a gift for a school or for purposes *ejusdem generis* : it is therefore a gift for charitable purposes, and fails by reason of the death of the testatrix within three months from the date of the execution of the will.

Assuming that "other purpose" includes purposes not charitable, the gift is still void ; for in such case it is uncertain whether the gift was intended for a school, *i.e.* for a charitable purpose ; or for a purpose not charitable. The Court cannot apportion the gift. It is the same as if it were a gift "to A or B," and is void for uncertainty. See observations of the Vice-Chancellor in *Ellis v. Selby* (9) at pp. 363, 364.

The gift to the plaintiff does not capture the devise to Father Larkin which has failed, and there is an intestacy as regards it.

(1) 14 Ves. 364, 370.

(2) 5 Cl. & F. 111.

(3) 10 Ves. 522.

(4) 5 Beav. 300.

(5) 13 W. R. 68.

(6) L. R. 13 Eq. 250.

(7) 2 V. & B. 294.

(8) L. R. 1 Eq. 313.

(9) 7 Sim. 352.

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THE MASTER OF THE ROLLS :—

I think that the authorities do not throw much light on the question to be determined, because the language used in this will is not identical with that used in any of the cases referred to, though, no doubt, in *Leavers v. Clayton* (1), where there was a direction to executors to apply “to any charitable or benevolent purpose they may agree upon,” and in *Ellis v. Selby* (2), where there was a direction to trustees to apply property “for such charitable or other purposes as they shall think fit,” the language used does bear a superficial resemblance to that of the present will.

The first question to be decided is whether the Rev. Thomas Larkin takes under the gift in the will as a trustee or beneficially. If the devise to him had stopped at the word “school” undoubtedly he would have taken as trustee, because the bequest of the dwelling-house, etc., would be to him “for a Roman Catholic school.” He would have been a trustee because the testatrix would then have imposed an obligation on the subject of the devise, and indicated an exclusive purpose, not dependent upon the devisee, which could only be carried out as a charitable trust. There would have been no question of personal benefit. But then the devise goes on—“Or for whatever other purpose he pleases.” These words are of the widest description. They apply, as an alternative, to the whole subject of the devise. If the words imported, as Mr. Bartley contended, that the alternative was to be “analogous” to those going before (*i.e.*, for whatever *analogous* purpose he chooses), or, as Mr. Glover preferred to put it, purposes “*ejusdem generis*,” no doubt the intention could only be effected by holding that the Rev. Mr. Larkin took as trustee. But I take the language as I find it. He is not described as a trustee, nor is he directed to hold upon any trust or for any purpose whatever. The testatrix says—“I give and bequeath my dwelling-house, office-house, yard, and garden to the Rev. Thomas Larkin, parish priest, for a Roman Catholic school, or for whatever other purpose he pleases.” That is, in effect, he may hold the property, the subject of the gift, or sell it, and devote the proceeds to the expressed and specified charitable

purpose, or to his own personal use in any way he may see fit. There is nothing in the language of the will to restrict him in its use or application. Suppose the gift had been to the Rev. Mr. Larkin for a private residence for himself (not for a school), or for a residence for the parish priest for the time being, or for whatever other purpose he pleases, no one in that case could get it into his head that such words would create a trust. Supposing that an action were instituted against him by the clergyman who was his successor, obviously such a claim could not succeed. The answer to it would be—"I have devoted the gift to another purpose, which is one that I have pleased to select." The power to devote a particular subject matter to a charitable purpose, or to any other purpose the owner may choose, is the incident of property and ownership. Had the gift been to Father Larkin as a trustee for purposes partly charitable and partly not charitable, the gift might fail, because it would be impossible to say how it was to be divided. We should then have a gift of ambiguous import. No one could say how much was for charity and how much not: though there are cases which seem to indicate that even in that case the subject matter should be equally divided: see *Salisbury v. Denton* (1), and others to the like effect. But there is nothing of the kind here. Mr. Larkin is not a trustee or executor. No doubt the testatrix may have had in her mind that her house was suitable for a Roman Catholic school, and so perhaps have contemplated, or at least supposed, that he might, if he thought fit, appropriate it to such use; but she has said that he need not do so—he may use it and enjoy it in whatever other way he pleases. In my opinion it is no part of my duty to strain the language used so as to defeat the intention, and thus to say that the Rev. Mr. Larkin took no interest in the devise, or to hold that the testatrix intended that part of her gift was to be applicable in one way and part in another. The construction I am asked by Mr. Bartley to put upon the will in effect is to strike out the words, "or for whatever other purpose he pleases," with the result of leaving him a mere trustee. But what the testatrix says really is, "I give you this and you may use it as a school, or do whatever you like with it."

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The property is given to him with complete discretion to do whatever he likes with it, and, as I have said, it is one of the inherent elements of property that the owner may apply it for a charitable purpose if he thinks right. I am not coerced by any authority to hold that he was a trustee, so that he could be called to account for the rents and profits. I am, therefore, of opinion that he took beneficially.

Solicitor for the plaintiff: *T. A. M'Lernon.*

Solicitor for the defendant: *W. J. Venables*

Solicitor for the heir-at-law: *T. J. S. Harbison.*

R. W. L.

IN RE DONELAN'S ESTATE.

Ross, J.
1901.

Revenue—Succession duty—Purchaser for valuable consideration—Trustees of marriage settlement—Statute of Limitations—16 & 17 Vict. c. 51, s. 17—The Customs and Inland Revenue Act, 1889 (52 Vict. c. 7, sect. 12, sub-sects. 1, 2, 3.)

June 6.

Appeal.
Oct. 31.

In 1857, on the death of A, lands became the subject of succession duty. B, the successor, died in 1867, having by will, made in 1863, charged the lands with £5000 in favour of C. In 1872 C, on his marriage, assigned the charge for £5000 to the trustees of his settlement, on the ordinary trusts of a marriage settlement. The lands were afterwards sold at the suit of an incumbrancer, and the Commissioners of Inland Revenue claimed to have the succession duty, which became payable in 1857, satisfied out of the proceeds of the sale in priority to the trustees of the marriage settlement of 1872:—

Held (affirming the decision of Ross, J.), that the trustees of the marriage settlement were purchasers for valuable consideration within the meaning of sect. 12 of the Customs and Inland Revenue Act, 1889, that as against them the succession duty was barred after the lapse of twelve years, and that they were accordingly entitled to priority over the Inland Revenue Commissioners.

OBJECTION to the final schedule of incumbrances by the Commissioners of Inland Revenue, who claimed succession duty on the death of Dominick Deane Skerrett on the 13th December, 1857, which amounted to the sum of £271 4s. 9d., down to the 10th August, 1893. The successor to the estate on the death of Dominick Deane Skerrett was John Joseph Locke Skerrett, who took an estate tail in the lands under the will of James D. Aylmer, dated the 4th January, 1794. By deed dated the 29th May, 1861, duly enrolled, John Joseph Locke Skerrett barred the estate tail, and became the owner in fee. In 1867 John J. Locke Skerrett died, having by will, made in 1863, charged the lands with £5000 in favour of Henry Darley. Henry Darley on his marriage with Marguerite Grene in 1872 assigned the charge for £5000 to the trustees of his marriage settlement in trust for himself, and his wife, and the children of the marriage. Peter Richard

Ross, J. Skerrett became entitled to the lands, subject to the charge for
 1901. £5000, on the death of John Joseph Locke Skerrett. Peter
In re Skerrett died in 1890, and the lands became the property of Cap-
 DONELAN'S tain Donelan. The trustees of the marriage settlement of
 ESTATE. H. Darley had not realized the charge of £5000, and were placed
 on the schedule at No. 8. But the Commissioners of Inland
 Revenue claimed that the duty was a first charge on the lands in
 priority to all incumbrances created by John J. Locke Skerrett
 or any person entitled in his right other than mortgages, and that
 the charge for duty should be inserted in the schedule of incum-
 brances in priority to the claims of those claiming under the will of
 J. J. Locke Skerrett.

The Solicitor-General (Wright, K.C.), and C. E. Mac Dermot,
 for the Commissioners of Inland Revenue.

Brereton Barry, K.C., for the trustees of the settlement of 1872.

Ross, J. :—

The only question I have to decide is, whether the trustees of this marriage settlement are purchasers for valuable consideration or not within the meaning of the section. It is contended by the Solicitor-General that the section only deals with a case where money, or money's worth, constituted the consideration. On the other hand, it is contended that the expression, "purchaser for valuable consideration," is used in the sense in which every lawyer understands it; that marriage is a valuable consideration; and, therefore, time has run in favour of the trustees. If section 12, sub-section 1, stood alone, there could be no doubt about the soundness of this latter contention. But I am obliged to construe it in connexion with sub-sections 2 and 3. Is there anything in these sub-sections to cut down the broad, well-settled meaning of the expression? It is to be observed that the duty unpaid at the expiration of the statutory period is not to be treated as extinguished. It no longer exists as a first charge on the lands of the purchaser for value or the mortgagee, but the purchaser or mortgagee is the only person protected. It is expressly enacted that

it is to be payable by the successor or persons accountable other than the purchaser or mortgagee.

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The 2nd sub-section applies to every case in which the 1st sub-section can take effect, and there is nothing to prevent its being applied in a case where the settlor, who is an accountable person, conveys away lands to trustees in consideration of marriage. The 3rd sub-section is introduced for the sake of caution, and expressly enacts what might have reasonably been implied from the preceding sub-sections, namely, that the liability is not affected of the accountable person, other than the purchaser or mortgagee, to payment of duty, whether out of money received on any sale, or mortgage, or "otherwise"; but the purchaser is not bound to see that the duty is discharged out of the money or other consideration for the sale or mortgage.

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There can be no doubt that the draughtsman uses words which are only applicable to a case where the consideration must have been money, or money's worth, out of which the duty could be discharged. But it seems to me that it is going too far to infer from a sub-section that more clearly preserves the liability of an accountable person to pay the duty out of the purchase-money, that the only case in which the relief conferred by the section can be made available is a case where the consideration consists of money, or money's worth.

I am, therefore, of opinion that the language of sub-section 3 has not the effect of limiting the meaning of the expression as used in sub-section 1. I accordingly overrule the objection.

W. C. S.

The Commissioners of Inland Revenue appealed (1).

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The Solicitor-General (Campbell, K.C.), and C. E. Mac Dermot,
for the appellants:—

Oct. 31.

The word "purchaser" in section 12 of the Act of 1889 is used in its commercial, and not in its legal, sense, and must mean

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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a buyer for money, or money's worth. It is used in the same sense in the Bankruptcy Act: *Ex parte Hillman* (1). The addition of the words "for valuable consideration" would be unnecessary if "purchaser" was to have its strict legal meaning.

The Succession Duty Act is to be construed according to the popular use of the language, and not according to the technical sense of the words: *Lord Braybrooke v. Attorney-General* (2).

Brereton Barry, K.C., for the respondents, was not called on.

LORD ASHBOURNE, C. :—

The point in this case is of course important, because if it were to be decided in favor of the Crown it would have far-reaching effects, and would entail very heavy liability upon one class of persons who are called upon to pay succession duty. The question is a narrow one, turning upon the construction of section 12 of the Inland Revenue Act, 1889. It is suggested that the words "purchaser for valuable consideration" in that section should have not their ordinary construction, but a special construction which would limit their meaning to money or money's worth, and would exclude marriage as a valuable consideration, although it is the highest consideration known to the law, and where, besides, there was money brought into settlement on both sides upon the occasion of the marriage.

One has only to refer to the judgment of Ross, J., to see how short and narrow the point is, because applying himself to the case, though he dealt with it adequately, his judgment occupies little more than a page. I agree with the learned Judge, and, in my opinion, his judgment is right in law. The words of the section are "purchaser for valuable consideration," and it is conceded that if these words receive their ordinary legal meaning the contention of the Crown cannot be sustained. But it is suggested that we should put a special meaning on the words. Why? Mainly on the contention that in the 2nd and 3rd sub-sections of this section the word "purchaser" occurs alone, and that therefore we must give the meaning of a purchaser for money, or in

(1) 10 Ch. D. 622.

(2) 9 H. L. Cas. 150.

moneys numbered, to the words in sub-section 1. I fail to see why we should give such a construction to words that in themselves are perfectly clear. It is also worthy of note that when the Legislature has desired that its enactment should have the meaning contended for by the Crown, it has found no difficulty in using plain words. In my opinion, the decision of Ross, J., is right, and, therefore, without asking any assistance from counsel for the respondents, I think his judgment should be affirmed, and the appeal dismissed with costs.

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FITZ GIBBON, L.J. :—

I concur. There are three great difficulties in the way of the Crown—(1). In the Act of 1853 the words “money and money’s worth” were used : they are abandoned in the Act of 1889, which is at issue here. (2) I see no reason why the term “purchaser for value” should be used or interpreted otherwise than in its legal sense. (3) Apart from the statute, this was a transaction for valuable pecuniary consideration, and not merely in consideration of marriage, because money funds were brought into settlement by both sides.

WALKER, and HOLMES, L.JJ., concurred.

Solicitor for Inland Revenue : *R. O’Brien Furlong.*

Solicitors for respondents : *William Roche & Son.*

R. D. M.

Appeal.
1901.

IN RE M'NAUL'S ESTATE; EX PARTE TRAILL (1).

Dec. 17, 18.

(RECORD No., 2356.)

1902.

Feb. 5.

Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105)—Fee-farm grant—Covenant against alienation—Covenant to pay increased rent on assigning or demising to any person outside a limited class—Land Purchase Acts—Redemption of superior interest.

By a lease for lives renewable for ever, made in the year 1763, the lessee covenanted to pay an additional rent if the lessee, his heirs or assigns, assigned or demised the lands, without the lessor's consent, to a person or persons other than the child or grandchild of the person so aliening or demising same. In a fee-farm grant made, in lieu of the said renewable lease, in the year 1852, a precisely similar covenant was inserted:—

Held (by the Court of Appeal), that the covenant was valid, and that regard must be had to it in fixing the redemption price of the rent payable under the fee-farm grant on a sale by the fee-farm grantee to an occupying tenant, under the Land Purchase Acts, through the Irish Land Commission.

Billing v. Welch (I. R. 6 C. L. 88) overruled.

APPEAL by Dr. Anthony Traill from the decision of Meredith, J., pronounced on June 3, 1901, confirming the order of Mr. Commissioner Lynch, dated April 2, 1901, whereby it was ordered that the perpetual yearly rent of £6 8s., reserved by an indenture of fee-farm grant dated June 7, 1852, and made between William Traill of the one part and Jane Hamilton of the other, and issuing out of the lands, the subject of the proceedings for sale in this matter, and all other superior interests (except the right of fishing reserved to the grantor in the said grant) be redeemed; and the Commissioner being of opinion that the covenant by the grantee, her heirs and assigns, in the said grant for the payment of additional rent of £5 10s. 9d. sterling, in the event of alienation or demise of all or any part of the said premises to any person or persons other than a child or grandchild of the person so aliening or demising without the consent of the grantor, his heirs and

assigns, is void, did order that no value be placed thereon in-fixing the redemption price of the said rent and superior interests.

By the above-mentioned fee-farm grant William Traill granted to Jane Hamilton, her heirs and assigns, for ever, part of the lands of Drumcrottagh, excepting and reserving to William Traill, his heirs and assigns, all quarries, etc., and also liberty to William Traill, his heirs and assigns, and his and their servants and attendants, to hunt, hawk, fish, and fowl upon the premises: the said Jane Hamilton, her heirs and assigns, yielding and paying unto the said William Traill, his heirs and assigns, the yearly rent of £6 8s., by equal half-yearly payments. The fee-farm grant contained a covenant by the said Jane Hamilton to pay the said rent of £6 8d., and all taxes and the usual powers of distress and entry for securing the same. Then followed a covenant in the words following:—"And the said Jane Hamilton for herself, her heirs, and assigns, doth hereby covenant, grant, and agree to and with the said William Traill, his heirs and assigns, that if she, the said Jane Hamilton, her heirs and assigns, shall at any time hereafter alien or demise all or any part of the premises to any person or persons whatsoever, other than a child or grand-child of the person or some or one of the persons so aliening or demising without the consent of the said William Traill, his heirs or assigns, in writing under his or her hand and seal first had and obtained, then and in such case the said Jane Hamilton, her heirs and assigns, from and after the time of such alienation or demise, shall pay unto the said William Traill, his heirs and assigns, for the said hereby demised and granted premises, over and above the said yearly rent, the further yearly rent of £5 10s. 9d. sterling, for and during the continuance of this demise and grant, the same to be paid by equal half-yearly payments upon every 1st day of May and 1st day of November, the first payment thereof to be made on such of the said days as shall first happen next after the time of such alienation or demise, and that the said William Traill, his heirs and assigns, shall have the like remedy by distress and otherwise for recovery of the said yearly rent of £5 10s. 9d. as he or they can or may have by virtue of these presents for recovery of the said yearly rent first above-mentioned and reserved."

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The fee-farm grant also contained a covenant by the grantee to keep all buildings on the premises in repair, and a covenant by the grantor for quiet enjoyment.

The fee-farm grant was made in accordance with the provisions of the Renewable Leasehold Conversion Act (to which it expressly referred) in lieu of a lease for lives renewable for ever, dated 13th October, 1763. This lease, and the last renewal thereof, dated 20th February, 1851 (made by William Traill to Jane Hamilton), were recited in the fee-farm grant. The rent reserved by the original lease was £6 13s. 3d. (Irish), with a renewal fine of £3 6s. 7½d. (Irish). The value of the renewal fine was estimated in pursuance of the Act at 5s. per annum, which, being added to £6 3s. sterling, the equivalent for £6 13s. 3d. (Irish), made up the fee-farm rent £6 8s., reserved by the fee-farm grant.

Both the original lease and the renewal contained a covenant by the lessee in the same terms as the fee-farm grant respecting the payment of the additional rent in the event of alienation to a person other than a child or grandchild of the person so aliening.

From the date of the fee-farm grant down to the date of the agreement for purchase hereinafter mentioned, no claim had been made by the grantor for the increased rent.

Mrs. Elizabeth Cecilia M'Naul was at the date of the institution of these proceedings owner of the said lands under the said fee-farm grant. She filed her originating statement on 22nd June, 1899, in the Irish Land Commission, for the purpose of selling the said lands under the Land Purchase Acts.

On the 22nd day of May, 1899, John M'Fall agreed to purchase the said lands under the Land Purchase Acts through the Land Commission, Elizabeth Cecilia M'Naul having made a sub-letting thereof to him under a tenancy from year to year at a rent of £27 15s.

The vendor, Elizabeth Cecilia M'Naul, applied to the Land Commission that the fee-farm rent of £6 8s., created by the said fee-farm grant, and issuing out of the lands sold in this matter, should be redeemed, together with all other superior interests (save the rights of fishing), created, reserved, or excepted by the said fee-farm grant. On this application Mr. Commissioner Lynch made the order dated April 2, 1901, which was affirmed by

Meredith, J., on June 3, 1901, from whose order this appeal was taken.

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No evidence was given in the Land Commission as to whether the sub-letting to John M'Fall was an event upon which the additional rent mentioned in the fee-farm grant would, if validly reserved or created, become payable. Dr. Traill made an affidavit stating the facts relating to this point for the Court of Appeal, but the affidavit was not allowed to be read.

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The abstract of title lodged by the vendor showed no disposition of the property on which the additional rent would have become payable.

Ronan, K.C., and *Dixon*, for the appellant:—

The judgment of the Irish Land Commission that the covenant to pay an increased rent on alienation to any person outside the class specified is void rests on *Billing v. Welch* (1). That decision cannot be sanctioned. It is based on the theory that the object of the Renewable Leasehold Conversion Act was to convert estates held under leases for lives renewable for ever into absolute fee-simple estates. But this is contradicted by the express words of the statute. The preamble recites the evils that had arisen from such tenures, and says that "it is expedient that such tenures should be converted *in manner hereinafter provided* into tenures in fee," and the first section enacts that when duly required the owner of the reversion of any such lease is to grant to the owner of the lease "an estate of inheritance in fee-simple in such lands, subject to a perpetual yearly fee-farm rent . . . and subject to the like covenants for securing the payment of such fee-farm rent as are contained in such lease with respect to the rent thereby reserved, and with *and subject to such other covenants (save covenants to grant . . . a renewal of such lease, and such covenants . . . as may be commuted as hereinafter mentioned)* as are contained in such lease." All the covenants in the lease except the covenant for renewal, and such covenants as may be commuted under the Act, are therefore to be inserted in the fee-farm grant, and the estate to be granted thereby is a fee-simple controlled and limited by these

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covenants. Section 3 specifies the covenants that are to be commuted, *i.e.* covenants interfering with the proper cultivation of the lands. The covenant in question here is not of the class which can be commuted, and was therefore rightly inserted in the fee-farm grant. Section 10 enacts that every covenant for payment of rent, "and every other covenant contained in pursuance of this Act in any such grant in substitution for a like covenant in the lease, when such last-mentioned covenant is of such a nature as that the burden thereof doth by law run with the land . . . shall run with the estate in fee-simple into which the estate held under such lease is converted, and the owner of such estate in fee-simple shall be chargeable upon such covenants in the same manner as if he were owner of the interest created by the lease and such interest were still subsisting." The object of the Act was to convert the leasehold tenure into a tenure in fee-simple, subject to the legal incidents annexed to the leasehold estate with certain specified exceptions. The Act says that in the fee-farm grant all the legal incidents of the estate are to be preserved except such as are to be commuted under section 3. The reasoning on which *Billing v. Welch* (1) depends is that the fee-farm grant is to confer a fee-simple absolute, subject only to a rent, and that any incidents attached to the lessee's old estate which are repugnant to a fee-simple estate are to be excluded from the fee-farm grant, and if inserted are void. The decision in that case is therefore plainly inconsistent with the statute. *Mahony v. Tynte* (2) illustrates the true view as to what covenants should be inserted in a fee-farm grant. It was there held a covenant reserving a penal rent for breaking up should be commuted under section 3, but that a covenant in the original lease for payment of increased rent in the event of any portion of the lands being let to persons holding adjacent lands, and a reservation (also in the lease) of an additional rent for each sub-tenant who should be a Papist should be inserted in the fee-farm grant. "The object of this Act was to substitute estates in fee for estates of freehold under leases perpetually renewable. With this was also comprised the purpose, studiously attended to in all its provisions, to preserve as far as

(1) I. R. 6. C. L. 88.

(2) 1 Ir. Ch. R. 577.

possible all the previously existing rights of both landlord and tenant . . . It qualifies and controls the operation of the statutable grant, so as to preserve, as far as possible, to the landlord the legal incidents annexed to his former estate. When it was meant to deprive him of them he was to be compensated, as in the 3rd section, when on the grounds of public policy he was to be deprived of the benefit of a covenant restrictive of the due cultivation of the land": *per* Blackburne, L.C., in *Gore v. O'Grady* (1). The decision in *Billing v. Welch* (2) is inconsistent with the law so laid down. It is not binding on this Court, and should be overruled. "I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or *dicta* as to its meaning when those decisions or *dicta* are not actually binding on me. I read the Act for myself. If I think it clear I express my opinion about its meaning, as I consider I am bound to do. Of course if other Judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But where there is no such binding decision, in my view a Judge ought not to allow himself to be biassed in the construction of a plain Act of Parliament by any number of *dicta* or decisions which are not binding on him": *per* Jessel, M.R., in *Re Willey* (3). There is no series of decisions here following *Billing v. Welch* (2) which has made a law which men follow in their daily dealings, so that inconvenience would result from its being overruled. The question as to the insertion of a covenant against alienation in a fee-farm grant arose also in *Re Quinn* (4), where no doubt Napier, C., said that such a covenant would be void as repugnant to the grant, but the case was really decided on the ground that the covenant had been waived. In *in re Lunham* (5) a covenant against alienation in a fee-farm grant was held void, but that was not the case of a fee-farm grant under the Renewable Leasehold Conversion Act.

The form of the covenant here does not absolutely prohibit alienation, but, like that in *Billing v. Welch* (2), puts a check upon

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(1) I. R. 1 Eq. 1.

(4) 8 Ir. Ch. R. 578.

(2) I. R. 6 C. L. 88.

(5) I. R. 5 Eq. 170.

(3) 23 Ch. D. p. 127.

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alienation to persons other than the child or grandchild of the grantee, her heirs and assigns. Such a covenant is not repugnant to an estate in fee-simple: the decision in *Billing v. Welch* (1) that such a covenant is repugnant to an estate in fee-simple was based on *Attwater v. Attwater* (2), which is inconsistent with *Doe v. Pearson* (3), and has been overruled by *In re Macleay* (4); *Rosher v. Rosher* (5); *Martin v. Martin* (6).

In *Billing v. Welch* (1) there was a covenant that the grantee would not assign to any person other than his child or grandchild: there is no such covenant here: the only covenant here is that if the grantee does assign to any person other than a child or grandchild she will pay an increased rent: such a covenant is not illegal or repugnant to the estate granted: it is not even a penalty: the meaning is that the covenantor may assign to whom she likes if she chooses to pay the increased rent: *French v. Macale* (7); *Gerrard v. O'Reilly* (8); *Legh v. Lillie* (9); *Ex parte Voisey* (10). The covenant is reasonable, and confers a valuable right on the landlord, of which he should not be deprived: *Ponsonby v. Adams* (11).

Conner, K.C., and *F. N. Greer*, for the respondent:—

For upwards of forty years, ever since the decision *In re Quin* (12), it has been the practice to omit covenants against alienation from fee-farm grants. The concluding paragraph of the judgment of the Lord Chancellor in that case was a direct instruction to the Masters that they should not insert such covenants in grants coming before them. No doubt the point was not absolutely decided in that case, but it was decided thirty years ago in *Billing v. Welch* (1) that a covenant against alienation was repugnant to the estate granted by a fee-farm grant under the Renewable Leasehold Conversion Act, and should not be inserted in any such grant, and further, if so inserted, was absolutely void. The Courts have always refused to insert in fee-farm grants under the Act

(1) 1. R. 6 C. L. 88.

(2) 18 Beav. 330.

(3) 6 East, 173.

(4) 1. L. R. 20 Eq. 186.

(5) 26 Ch. D. 801.

(6) 19 L. R. Ir. 72.

(7) 2 Dr. & War. 269.

(8) 3 Dr. & War. 414.

(9) 6 H. & N. 165.

(10) 21 Ch. D. p. 445.

(11) 2 Bro. P. C. 431.

(12) 8 Ir. Ch. R. 578.

covenants that are repugnant to an estate in fee-simple, *e.g.* a covenant giving the landlord a right of pre-emption; and the lessor's remedy for the non-insertion of such a covenant is compensation under the 5th section of the Act: *In re Jackson* (1). If the covenant here was of any value to the landlord it should have been commuted, as it was contended the covenant for pre-emption should have been in that case. In *Ex parte Raymond* (2) it was held that a covenant against alienation providing for payment of an increased rent in case of breach should not be inserted in a fee-farm grant under the Act. There has been therefore a uniform course of practice and decision excluding such covenants from fee-farm grants on the ground that they would be void if inserted as repugnant to the estate granted. Further, the appellant's contention is practically a repetition of the view of Barry, J., who dissented from the judgment of the Court in *Morris v. Morris* (3), and whose language is expressly questioned by Christian, L.J., in *Batteste v. Maunsell* (4). "His (Mr. Justice Barry's) conception, if I have understood him, is that these grants derive nothing at all from the common law, but are pure creatures of the Act, and, like a picture or a statue, possess no qualities or attributes save those which their creator has conferred upon them. At page 297 of the report I find him saying, 'I do not think a fee-farm grant executed and operating under the statute can have *any* other effect or operation save what is assigned to it by the Act of Parliament.' And, again, in the next page, 'I therefore think that, whatever is to be the effect of the fee-farm grant, it can *only* have such operation as is conferred upon it by statute.' From that I dissent. A grant in fee-farm—in other words a conveyance of the fee, reserving or taking back a rent—is not a creation of the Renewable Leasehold Conversion Act, but a known and familiar form of legal conveyancing which existed for centuries before that statute was thought of. The Legislature has simply taken it up as it found it, and used it as its instrument for attaining certain purposes, and in so doing must be held to have retained all its attributes and consequences save so far as the statute itself has

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(1) 11 Ir. Ch. R. 145.

(2) I. R. S Eq. 231.

(3) I. R. 7 C. L. 295.

(4) I. R. 10 Eq. p. 337.

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withdrawn or qualified them." There is the further objection to the covenant that it purports to create an estate or interest in land which may arise at a period of time beyond that allowed by law for the creation of perpetuities : *London and South-Western Railway Company v. Gomm* (1).

Dixon, in reply :—

There is no unbroken series of decisions that a covenant like that here should not be inserted in a fee-farm grant, or, if inserted, is void. The decision of the Court in the case of *In re Quin* (2) rested on the grounds that the covenant had been waived, and, therefore, was not a "subsisting" covenant within the meaning of section 1 of the Act. Besides, the covenant in that case was an absolute covenant against alienation. *Ex parte Raymond* (3) was also a case where the covenant was held not to be a "subsisting" covenant by reason of its having been waived or its breach acquiesced in. *In re Jackson* (4) was the case of a covenant for pre-emption which the grantor's counsel did not press to have inserted in the grant, preferring to have it commuted, and Judge Longfield merely decided that the covenant was of only nominal value.

Neither is there any evidence of there being an unvarying practice on the part of conveyancers omitting such covenants or treating them as void. On the contrary, it appears from the report of *Ex parte McNeillys, Minors*, given in *Edge on Leases* (page 212), that the contention of the landlord in that case that a non-alienation clause should be inserted in a fee-farm grant was successfully pressed. This covenant does not come within the cases mentioned in section 5 ; in any event it was inserted in the fee-farm grant, and compensation was not given for it.

If our construction of the statute is correct, the objection that this covenant is void as violating the rule against perpetuities fails. An increased rent to arise at a future time depending on the happening of a contingency would be validated by the statute in the same way as perpetuity rents variable on contingencies are validated by the Church Temporalities Acts.

(1) 20 Ch. D. 562.

(2) 8 Ir. Ch. R. 578.

(3) I. R. 8 Eq. 231.

(4) 11 Ir. Ch. R. 145.

FITZ GIBBON, L. J. :—

In this case Elizabeth C. M'Naul is proceeding before the Land Commission under the Land Purchase Acts to sell in fee-simple, discharged from all superior interests (except a liberty to fish), certain lands of Drumcrottagh, held under a fee-farm grant dated the 7th June, 1852, made under the Renewable Leasehold Conversion Act. The grantor's interest is now vested in Dr. Traill; the grantee's interest is vested in the vendor. In ordinary course an order, dated the 2nd April, 1901, was made that the perpetual yearly rent of £6 8s. reserved by the grant should be redeemed. This order contained the following additional declaration :—

“The Court, being of opinion that the covenant of the grantee, her heirs and assigns, in the said grant for payment of the additional rent of £5.10s. 9d. in the event of alienation or demise of all or any part of the premises to any person or persons whatsoever other than a child or grandchild of the person so aliening or demising without the consent of the grantor, his heirs and assigns, as therein provided, is void, doth order that no value be placed thereon in fixing the redemption price of the said rent.”

Dr. Traill has appealed against this declaration, contending that the covenant is a good and valid covenant as between the grantor and grantee, and that he is entitled to have the £5 10s. 9d. in addition to the £6 8s. redeemed, and to be paid the redemption value of both the said rents, and his costs.

The fee-farm grant is founded on a lease of the 13th October, 1763, which was last renewed on the 20th February, 1851. Renewal fines were reserved by the lease, and were duly included in the fee-farm rent of £6 8s. But the grant contained the proviso and further covenant that if the grantee, her heirs and assigns, should at any time thereafter alien or demise all or any part of the premises to any person or persons whatsoever other than a child or grandchild of the person or of some one or other of the persons so aliening or demising without the previous consent of the grantor, his heirs or assigns, in writing under hand and seal, then and in such case the grantee, her heirs and assigns, from and after the time of such alienation or demise, should pay over and above the said yearly rent the further yearly rent of £5 10s. 9d. during the

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continuance of the demise and grant, the same to be paid half-yearly upon every 1st May and 1st November, the first payment to be made on such of the said days as should first happen after the alienation or demise; and that the grantor, his heirs and assigns, should have the like remedy by distress and otherwise for recovery of the said yearly rent of £5 10s. 9d. as they might have by virtue of the grant for the recovery of the yearly rent first reserved.

The appeal was opened with the statement that the Court would be called upon to consider whether the decision of the Queen's Bench in *Billing v. Welch* (1) in 1871 could be reconciled with the provisions of the Renewable Leasehold Conversion Act.

That decision bound the Land Commission, but it does not bind this Court, and, so far as we can ascertain, it has never hitherto been considered here. My colleagues will refer to the authorities, and to avoid repetition I abstain from doing so. But we are agreed that *Billing v. Welch* (1) cannot be distinguished from this case, though probably the other cases cited might be. We find ourselves reduced to the alternative of overruling *Billing v. Welch* (1), or of disobeying the statute. Where a statute is concerned, and the opinion of the Court of Appeal is clear as to its construction and effect, it must prevail against any previous practice or decision of a Court below, because there can be no jurisdiction to disregard it. We hold, upon the words of the Renewable Leasehold Conversion Act, that when the fee-farm grant came to be executed, the grantor was entitled to require that the covenant in question should be retained in it, and that, when it was so retained, it became, and it still is, a valid obligation binding the grantee and the lands.

We hold, in general, that the doctrine of repugnancy applicable at common law to an estate in fee is modified, in the case of fee-farm grants founded on renewable leases, by whatever obligations are lawfully inserted in the grants. The object of the Act was to give a perpetual estate, which was not a common law estate in fee, but was an estate created under the statute, which was to remain subject to all covenants and conditions which had bound the previous leasehold estate, save so far as they were got rid of in

(1) I. R. 6 C. L. 88.

the manner provided by the Act. When not so got rid of, they were to be retained in the grant, and the decision in *Billing v. Welch* (1) cannot be sustained in so far as it avoids such obligations upon the ground of repugnancy to a common law estate in fee.

The preamble mentions as the mischief against which the Act was directed the "great expense" constantly incurred in procuring renewals under covenants for perpetual renewal, and the "litigation and inconvenience" arising from tenures under leases with such covenants; and it declares it to be expedient that such tenures should be converted, *in manner thereafter provided*, into tenures in fee.

This preamble has been repealed by the Statute Law Revision Act, 1892, but with the proviso that such repeal "shall not affect the construction of the statute, whether as respects the past or the future." This makes the Revised Edition a trap for any adviser or Court which has to determine the effect of the Act, when the repealed preamble has any effect in indicating the scope or purpose of the statute. Here it defines and limits the operation of the Act to the "manner hereinafter mentioned," and it thereby distinguishes the tenure to be created under it from tenures in fee at common law.

Sect. 1 provides that the grant shall be "subject to the like covenants and conditions for the payment of the perpetual yearly fee-farm rent as are contained in the converted lease with respect to the rent thereby reserved, and with and subject to such other covenants, conditions, exceptions, and reservations (save covenants to grant or to accept and take a renewal of such lease, and such covenants, conditions, exceptions, and reservations as may be commuted as hereinafter mentioned) as are contained in such lease and then subsisting."

It has not been disputed that the limited covenant restraining alienation without the lessor's consent to descendants of the grantee, by providing for the payment of an additional rent of £5 10s. 9d., was a valid and subsisting provision in the lease. It was, in our opinion, not a covenant prohibiting alienation—on the contrary, it permitted alienation on the terms of paying the additional rent. It could not be omitted from the grant, save on commutation or by consent.

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Sect. 3 provides for the commutation of any subsisting exception or reservation contained in the lease, or any right under covenants or otherwise annexed to the reversion which interferes with the proper cultivation of the land. The provision, therefore, did not apply to the covenant in question here. But it is, at best, optional. It empowers the grantee *if he think fit* to require that such exception, reservation, or right should cease wholly or partially; and in such case it enacts that the grant shall be modified accordingly, and that the fee-farm rent shall be increased by an amount equivalent to the value of such exception, reservation, or right, in so far as it is made to cease as aforesaid, such amount to be ascertained in manner mentioned in the Act, in case the parties differ about the same.

If the lessee does not "think fit" to commute it, even a covenant which interferes with the proper cultivation must, under this section, remain in the fee-farm grant.

Sect. 4 provides for a similar commutation of any right to timber, bogs, minerals, quarries, or royalties; but it does not make it lawful for the owner of the lease to require that such rights shall cease, either wholly or partially, unless the owner of the reversion and the owner of the lease agree, and in such case the grant is to be modified accordingly.

Sect. 5 provides compensation for the owner of the reversion where the estate into which the reversion would be converted upon a grant under the previous provisions would not afford full compensation for the loss of such reversion, or of any power, benefit, or advantage incident thereto, or enjoyed by the owner thereof, under any Act of Parliament, charter, settlement, or otherwise. It enables the owner of the reversion to require such loss to be compensated, either by an addition to the fee-farm rent, or at his option by the payment of such a gross sum of money (the amount in either case to be ascertained as mentioned in the Act, in case the parties differ about the same) as will afford a full compensation for such loss, to be estimated according to the difference in marketable value.

The observation applies alike to sects. 3, 4, and 5, that it is in no case compulsory upon the parties to modify the terms of the lease: if not modified, the same terms must be contained in the

grant; and whenever they are modified, the equivalent or compensation must be provided in manner directed by the Act. In no case can an operative condition or covenant in the lease be omitted from the grant, unless by consent, or upon giving the statutory equivalent or compensation.

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Sect. 7 provides that, where the grant is made, the reversion shall be converted into an estate of inheritance in fee-simple in the fee-farm rent made payable by the grant, and the conditions, exceptions, and reservations therein contained, and all rights annexed or belonging to such reversion saved by and not commuted under the Act; and such estate of inheritance in fee-simple as aforesaid shall be transmissible and descendible in like manner as if the same were an estate of inheritance in fee-simple in reversion in the lands on which the fee-farm rent is charged by the grant creating the same, having incident thereto the conditions, exceptions, and reservations contained in the same grant, and such rights respectively as aforesaid; and the estate of inheritance created under every such grant as aforesaid in the lands comprised therein, and the estate of inheritance so created as aforesaid in the fee-farm rent made payable by such grant, shall from and after the execution of such grant be respectively vested in the same persons for the same estates and interests, and be respectively subject to the same uses, trusts, provisos, agreements, and declarations as the estate held under the lease, and the reversion or estate by the owner of which the grant is made, were respectively vested in, subject to, and charged with, immediately before their conversion, or as near thereto as the different natures of the estates and the circumstances of each case will admit.

This section, if it stood alone, might lend some colour to the contention that the statutory estate was "an estate of inheritance in fee-simple." But sect. 10 provides that all covenants by law implied on the part of landlord or tenant upon any lease, and every covenant for payment of rent, and every other covenant contained in pursuance of the Act in any such grant as aforesaid, in substitution for a like covenant in the lease, where such last-mentioned covenant is of such a nature as that the burden thereof doth by law run with the land, shall run with the estate in fee-simple into which the estate held under such lease is converted

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under the Act, and the owner or assignee for the time being of such estate in fee-simple shall be chargeable upon such covenants *in the same manner and to the same extent as if he were owner or assignee of the term or interest created by the lease, and such term or interest and the estate out of which such lease was derived were still subsisting*, and the benefit of such covenants shall run with the estate into which such estate is converted under the Act, and the owner or assignee for the time being of the estate created by such conversion shall have the full benefit of such covenants, and be entitled to maintain actions thereon.

This section makes it impossible to apply the doctrine of repugnancy as affecting estates in fee at common law to an estate which is to be deemed to be *a term created by a lease still subsisting*.

The sections which I have quoted appear to enact as plainly as words can provide, (i) that the limited covenant restricting alienation by making additional rent payable thereon was rightly retained in the grant; (ii) that being so retained it must have the same effect as if the lease were still subsisting. It follows that it cannot be void for repugnancy to a common law estate in fee; and that the appeal must be allowed.

But it does not follow that the grantor is now necessarily entitled to the full redemption price of the additional rent of £5 10s. 9d.; because that rent is not yet payable; and it is not proved that there has, as yet, been any alienation upon which the additional rent began to run.

We must discharge the order appealed from in so far as it declares the covenant to be void. The Land Commission has jurisdiction to redeem the whole interest of the grantor under the grant, and the only relief to which the appellant is entitled is a declaration that, in fixing the amount of the redemption price, regard is to be had to the existence in the grant of the covenant referred to. The price will be enhanced by whatever may be justly ascertained to be "the difference in marketable value" which the existence in the grant of the condition and covenant respecting the additional rent gives to the grantor. In other words, he is entitled to the price of the chance or prospect that, if the redemption did not take place, the £5 10s. 9d. would have

become payable on some future alienation to some person other than a descendant of the grantee for the time being.

It is not for us to indicate, and we have no means of estimating, what the amount of such an enhancement may be. The case will be remitted to the Land Commission, with the foregoing declaration, to proceed thereon as to justice may appertain.

The applicant will be entitled to his taxed costs before the Land Commission and upon this appeal, as costs of the redemption, to be added to the redemption price, or to be paid by the grantee if the redemption is not carried out.

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WALKER, L.J. :—

This appeal raises a question of very general application as to the rights of lessors and lessees of leases for lives renewable for ever whose leases have been converted into statutory fee-farm grants.

It was quite common to find in such leases before conversion covenants against alienation, sometimes absolute in form, sometimes qualified as to the persons to whom only alienation is permitted, and sometimes again qualified with a statement such as we have here of the consequences to the lessee which would result from the breach. I have never heard it questioned that all such covenants were lawful while the leases remained unconverted. The effect of the conversion generally compulsorily made against the lessor is what we have to consider, which involves two questions—(1) whether they should be inserted in the grant, and if so (2), whether they are lawful, and their effect in the way of consequence to the grantee if they are broken. I shall recur to this last point when I have dealt with the general one as to the effect of the statute on the leases, and the covenants contained in them.

It is admitted that Mr. Justice Meredith could have made no other order than he did, having regard to the decision in *Billing v. Welch* (1) which bound him. But we are compelled to consider the whole question, including, no doubt, the fact that *Billing v. Welch* (1) was decided thirty years ago, and has not since, apparently, been quarrelled with.

(1) I. R. 6 C. L. 88.

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Before I approach the consideration of the Act of Parliament I should like to refer shortly to the cases cited, none of which, I think, amount to a decision on the question except *Billing v. Welch* (1).

The first was *Mahony v. Tynte* (2), but it decided nothing favourable to respondent, and in fact the question discussed before us was not raised.

Re Quin (3) was the next. This case was decided upon another sufficient ground, but the Lord Chancellor, no doubt, gives an opinion upon the legality of a covenant against alienation, and the propriety of inserting it, assuming, apparently, the estate granted to be an ordinary estate in fee, unqualified in its incidents. Lord Justice Blackburne expresses no opinion on that point.

In *Jackson's Estate* (4) it was held that the landlord was entitled to compensation under the 5th section of the Act for the non-insertion of a covenant giving a right to pre-emption which the landlord did not press to have inserted, and the compensation was fixed at 1*d.* per year.

Gore v. O'Grady (5) is in favour of the appellant to this extent, that the execution of the fee-farm grant was held not to alter the pre-existing rights of the landlord in respect of turf cut for sale.

In *Lunham's Estate* (6) the grant was made in 1858, and before the Act of 1860, and no question arose on the effect of a conversion under the Renewable Leasehold Conversion Act.

Billing v. Welch (1) is an express authority which we have to consider, for the covenant was as here inserted in the grant. I cannot find any substantial difference between the covenant there and here, and it does appear that counsel referred to the material sections, but I do not think they received sufficient consideration. All Mr. Justice O'Brien says on that point is—"In the argument before us no sufficient reason has been suggested, either from the provisions of the statute or otherwise, why the covenant which would be void in an ordinary grant should not be held to be also void when inserted in the statutable grant." I cannot think that sufficient consideration was given to the effect of the statute when

(1) I. R. 6 C. L. 88.

(2) 1 Ir. Ch. R. 577.

(3) 8 I. Ch. R. 578.

(4) 11 Ir. Ch. R. 145.

(5) I. R. 1 Eq. 1.

(6) I. R. 5 Eq. 170.

the question, which is in my view the only material one, was so summarily dealt with.

The case of *Ex parte Raymond* (1) does seem to proceed on the assumption that a covenant against alienation was one which would not be inserted in a fee-farm grant under the practice then prevailing—in other words, that *Billing v. Welch* (2) should regulate that practice.

The case, therefore, is reduced to the question whether we should follow the decision in *Billing v. Welch* (2), which we are asked to review, or whether, if we thought that decision wrong, we should consider ourselves bound by the course of practice and professional opinion which have prevailed since *Billing v. Welch* (2) was decided.

Now, in the first place, this case depends on the construction of an Act of Parliament creating rights and preserving them, and even a continuous course of decisions on it would not allow us to escape from the responsibility of deciding on its true construction. *The Sara* (3) is a conclusive authority upon that point. Here, too, we have the covenant inserted in the grant, and unless we decide that it is illegal, the appellant is entitled to say that regard must be had to it in fixing the value of the landlord's rights, so that we are driven to decide the net point on the Act of Parliament.

It is true that a clause against alienation is inconsistent with the nature of a common law fee-simple estate, and therefore inoperative where such an estate is granted.

But the real question is whether that doctrine applies to the statutory fee-simple substituted for a lease containing such a covenant, and to the reversion to which it had before been legally incident by contract. That depends on the true construction of the statute as applicable to the subject-matter. The Renewable Leasehold Conversion Act was passed on the 1st August, 1849, and every student of Irish law is aware of the fact that the tenure of leases for lives renewable for ever had for a century previous to 1849 been the cause of much litigation, and accordingly the Act recites that "it is expedient that such tenures should be converted in manner hereinafter provided into tenures in fee." There

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1902.

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ESTATE.

Walker, L.J.

(1) I. R. 8 Eq. 231. (2) I. R. 6 C. L. 88. (3) 14 App. Cas. 209.

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is no doubt that leases for lives renewable for ever contained covenants by lessor and lessee of every kind, the benefit and burden of which ran with the land, and covenants by the lessee in the form of that which we have to consider, and even absolute covenants against alienation were usual and quite legal, and *a priori* one would expect that when the owner of the perpetual lease was authorized by the Act, as he is, to require the owner of the reversion to execute to him a grant under the Act, the reversion was not to be deprived of the benefit derived from the lessee's covenant unless compensation was provided, and we find accordingly that the grant is to be made subject to the like covenants and conditions for securing the payment of the fee-farm rent as are contained in the lease with respect to the rent thereby reserved, "and with and subject to such other covenants, conditions, exceptions, and reservations (save covenants to grant or to accept and take a renewal of such lease, and such covenants, conditions, exceptions, and reservations as may be commuted as hereinafter mentioned) as are contained in such lease and then subsisting." The Act then provides that any subsisting exception or reservation contained in the lease which interfered with the proper cultivation of the lands should be commuted, saving, however (unless by consent), rights to timber and the like, and mines, minerals, and royalties.

The 5th section provides for the giving of compensation in cases where there was a loss on the conversion of the reversion into a rent, or the loss of any power, benefit, or advantage incident to such reversion.

The 7th section is important, as it directs that the estate held under the lease shall be converted into an estate of inheritance in fee-simple in the fee-farm rent made payable by the grant, and the conditions, exceptions, and reservations therein contained, and all rights annexed or belonging to the estate by the owner of which such grant is made, saved by and not commuted under the Act. The fee-farm estate is transmissible and descends in like manner as if it were an estate in fee-simple, but the greatest care is shown that the rights between grantor and grantee shall not be altered save as expressly provided for.

The 10th section seems to close all controversy. It deals with

implied covenants on the part of landlord and tenant which it enacts shall be implied in the grant, and express covenants transferred from the lease to the grant, the benefit or burden of which ran with the land, and it enacts that they shall run with the estate in fee-simple into which the estate held under the lease is converted, and it proceeds: "And the owner or assignee for the time being of such estate in fee-simple shall be chargeable upon such covenants in the same manner and to the same extent as if he were owner or assignee of the term or interest created by such lease or underlease, and such term or interest, and the estate out of which such lease or underlease was derived, were still subsisting," and the section concludes by giving the right to maintain actions on such covenants. This seems to transfer the benefit and burden of every covenant in the lease to the substituted grant, and, further, makes careful provision for the preservation of every right of the landlord and every liability of the tenant. The same policy appears in section 20, which gives rights under the ejectment statutes for the recovery of the fee-farm rent.

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In my opinion there is in cases of grants under the Renewable Leasehold Conversion Act a statutory fee-simple created with a statutory reversion to which are legally incident by statute all covenants in the lease not commuted under the statute; and I think there is no legal justification for excluding from the grant covenants against alienation, much less such a covenant as we have to deal with here, and which in fact we find inserted. I express no opinion as to the mode in which an absolute covenant against alienation is to be dealt with or how it is to be enforced. That point does not arise in the present case. I think the covenant in question now is legal, and I am also of opinion, on the authorities, that it was open to the grantee to break this covenant on the terms of paying the fixed price of the additional rent of £5 10s. 9d. It follows that in fixing the redemption price regard must be had to it, but we cannot say more. The additional rent has never been claimed or enforced, and it is not for us to measure the extra value to be attributed to the redemption price by reason of the existence of the covenant.

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HOLMES, L. J. :—

It is strange that the question raised in this case, upon which Lord Chancellor Napier expressed a decided opinion in the year 1858, has not since been brought before an appellate Court. I am disposed to agree with counsel for the respondent that Mr. Napier's view, especially since the judgment in *Billing v. Welch* (1), has been generally acted upon by the profession ; and although some conveyancers may have entertained doubts as to its soundness, the interests at stake were not worth the risk of litigation, involving an appeal to successive Courts.

The determination of the point at issue depends entirely upon the provisions of the Renewable Leasehold Conversion Act, which became law in 1849. In construing that or any other statute great assistance may be derived from authority ; and where a possible and reasonable construction has received judicial sanction in a case that has been subsequently followed without appeal in Courts of first instance, I should be prepared to accept it, even although my own mind might lean to a different interpretation. This Court recently acted on this principle in *Re Kane* (2), where, in consequence of a course of decision extending over thirty years, we adopted a doubtful view of the requirements of the Judgment Mortgage Act.

The Renewable Leasehold Conversion Act was carefully drawn for the purpose of converting leases with covenants for perpetual renewal into tenures in fee, without undue interference with the rights and obligations of the several parties interested in the lands. A lease for lives with a covenant for perpetual renewal is a form of tenure peculiar to Ireland, which doubtless owed its origin to a desire to attach to a perpetual freehold interest the terms, conditions, and covenants to which leaseholds can be legally made subject. At least it is certain that many of these instruments contained the same provisions for the protection of the landlord, and the proper treatment and cultivation of the lands, as are found in agricultural lettings for terms of years. When the tenure substituted by the statute put an end to the reversion, and with it destroyed the only means then known to

(1) I. R. 6 C. L. 88.

(2) [1901] 1 I. R. 520.

the law for enforcing such obligations as I have referred to, the policy of the Legislature required that the lessor's rights should be preserved in some other way, or that an equivalent therefor should be given him. Accordingly, we find it provided by the first section of the Act that the grant of the estate of inheritance in fee-simple to be made by the owner of the reversion shall be subject to a fee-farm rent of such amount as therein is specified, "and subject to the like covenants and conditions for securing the payment of such fee-farm rent as are contained in such lease with respect to the rent thereby reserved, and with and subject to such other covenants, conditions, exceptions, and reservations (save covenants to grant or to accept and take a renewal of such lease, and such covenants, conditions, exceptions, and reservations as may be commuted as hereinafter mentioned) as are contained in such lease and then subsisting."

The third section provides that where any exception, reservation, or right, under a covenant, or otherwise annexed, or belonging to the reversion, interferes with the proper cultivation of the lands, the lessee may, if he thinks fit, require that such exception, reservation, or right should cease wholly or partially, and in such case the grant shall be modified accordingly, and an equivalent given therefor by an increase of the fee-farm rent.

Section 4 enacts that in the case of certain of the rights mentioned in the preceding section its provisions shall only apply where the owner of the reversion consents.

Section 5 provides for further recompense to the landlord in cases in which the substituted estate taken by him under the previous sections would not afford full compensation for the loss of the reversion; and lest the traditions of the common law might thereafter be used to defeat the desire of Parliament to preserve all the essential features of the contract, it is provided in the tenth section that the burden and benefit of covenants, which, while the lease was subsisting, ran with the lessee's interest, and with the reversion respectively, would continue to run with the substituted estates in the same manner and to the same extent as if the owner in fee-simple were still owner or assignee of the term.

I doubt if a somewhat complicated subject could be dealt with in clearer language. All good and lawful covenants

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Appeal. contained in the lease were to be introduced into the fee-farm
 1902. grant, subject to the proviso that the lessee, if he thought fit,
In re might require the commutation of such of them as interfered with
 M'NAUL'S the proper cultivation of the land; and when so introduced the
 ESTATE. owner of the fee-farm rent, or his assignee for the time being,
 Holmes, L.J. was, in the words of the tenth section, to "have the full benefit of
 such covenants, and be entitled to maintain actions thereon" against the owner or assignee for the time being of the estate in fee-simple, into which the lease had been converted.

Restraints on alienation without the consent of the lessor have been always usual in Irish leases; and so far from being regarded as invalid, or contrary to public policy, they have been treated with special favour by the Legislature. Sometimes the restraint took the form of absolute prohibition; in other cases assignment was permitted in favour of a limited class or on the payment of a fine or an increased rent. In leases for lives perpetually renewable covenants of this kind, although not uncommon, were, when they existed at all, generally of the latter class.

The political history of the country, taken in connexion with the peculiar tenure and the comparatively moderate amount of the rent and fines, suggests that in making these leases the lessors were not influenced solely by pecuniary considerations; and it was natural for them to secure, as far as possible, that the holdings should remain in the hands of friendly tenants. This would seem to have been the object of the covenant contained in the original lease of the 13th October, 1763, by which the lessee, his heirs and assignees, in the event of his or their aliening or demising all or any part of the premises to any person other than a child or grandchild without the consent of the lessor, were bound to pay thereafter, in addition to the rent reserved, the further rent therein provided. When the lease was converted pursuant to the provisions of the statute into a fee-farm grant, dated the 7th June, 1852, a similar covenant was inserted in that instrument; and it is admitted that from that time to the present the event has not happened on which the increased rent was made payable.

In the view I take of the case it is needless for me to consider

whether it would be possible to make at common law or under the Statute of Uses a grant of lands in fee-simple subject to a perpetual yearly rentcharge, liable to be increased in the circumstances mentioned in the lease. I am satisfied that the additional rent is not a penalty, that the lessee could not have been prevented by injunction from assigning to a stranger, and, therefore, that the restraint on alienation is of a limited and partial character.

The conclusion at which I have arrived, however, does not depend upon these considerations. It is admitted that the covenant was operative and legal in the lease, and it does not lose this character when embodied into the fee-farm grant pursuant to the statute. Nor is it necessary for me to determine whether it interferes with the proper cultivation of the lands. The lessee is given the right, if he thinks fit, to require the omission and commutation of such covenants; but where he allows them to be inserted in the fee-farm grant he is bound by them. The question in this appeal is answered by reading the sections of the Act which, in my opinion, leave no doubt that the provision for payment of an increased rent in the event specified was properly inserted in the grant, and that such rent would be recoverable if and when such event happened.

It may at first sight appear strange that this is the first occasion upon which the matter in controversy has been discussed in the light of the language of the statute. *Mahony v. Tynte* (1) has been relied on by Mr. Ronan as an authority in favour of the appellant; but Smith, M.R., seems to have decided that case upon the principles of the common law as to feoffments in fee. So, too, in the judgment of Napier, C., in *Re Quin* (2), there is reference to the special provisions of the Act. *Billing v. Welch* (3), which in its facts is undistinguishable from the present case, and which the allowance of this appeal will overrule, gives no indication that the words and intention of the statute were considered by the Court.

Curious as this is, I think it can be easily accounted for. I have often noticed that lawyers of an earlier time, while admitting

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(1) 1 Ir. Ch. R. 577.

(2) 8 Ir. Ch. R. 578.

(3) I. R. 6 C. L. 88.

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1902.

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the theoretical omnipotence of an Act of Parliament, were slow to believe that the Legislature would disregard those principles of the common law which had been invested by time and learning with an almost sacred character.

In *Riordan v. M'Namara* (1) I made some observations on this subject, which further experience has tended to confirm. We of a later generation, who have seen rampart after rampart of legal feudalism disappear before the steady inroad of legislative innovation, can hardly understand the difficulty which our predecessors had in realising a fee-simple estate moulded and modified by statute. There is, however, one passage in the judgment of Barry, J., in *Morris v. Morris* (2), which sets forth the true nature of the estate taken by a grantee under the Act of 1849. "Whatever be the effect," he says "of the fee-farm grant, it can only have such operation as is conferred on it by the statute, and that operation is to be ascertained from the language of the Legislature construed according to the well-known rule that every clause and every word must obtain its full and ordinary force and meaning, unless such construction would lead to some absurdity or some repugnance or inconsistency with the other provisions of the enactment."

Adopting these words and applying them to the present case, I am unable to hold that a covenant inserted in the fee-farm grant, pursuant to the mandate of the statute and for the enforcement of which special statutory provision is made, is void. Being a good covenant, regard must be had to it in fixing the redemption price of the rent; but to what extent such price will be affected thereby can only be determined by the Land Commission.

This may involve some difficulty; for it must be remembered, that although up to the present time the event upon which the increased rent becomes payable has not yet happened, its happening in the future can hardly be described as a mere chance, inasmuch as the right to redemption is dependent upon a transfer of the lands.

Solicitors for the appellant: *Crookshank, Leech & Davies.*

Solicitors for the respondent: *Greer & Hamilton.*

G. Y. D.

(1) 30 L. R. Ir. 495.

(2) I. R. 6 C. L. 73.

EARL OF GOSFORD, LANDLORD ; ALEXANDER AND
OTHERS, TENANTS (1).

Appeal
1901.

DUKE OF MANCHESTER, LANDLORD ; SHEVLIN AND
OTHERS, TENANTS (1).

Jan. 21, 22.
Feb. 25.

*Landlord and tenant—Land Law (Ireland) Act, 1881, sect. 48, sub-sect. 4—
Fair rent—Principles of valuation—Evidence that Court valuers acted on
erroneous principles.*

Some time previous to the hearing of the cases before the Court the agent of the landlords met on the farm of a tenant, whose fair rent was then being fixed, two Court valuers, to whom he pointed out an adjoining farm, telling them its acreage, and the rent at which it had lately set, and the gross sum paid by the tenant on entering. One of the Court valuers replied, in the hearing of the other, that the only thing they took into consideration was what, in their opinion, the tenant could make out of the farm. The circumstances of the district—what the land would let for in the district—did not influence them. On the hearing of the cases now before the Court these statements were relied on by the landlords as showing that the Court valuers were in the habit of acting on erroneous principles, and that their reports should be accordingly rejected:—

Held, by the Court of Appeal (affirming the decision of Meredith, J.), that the evidence did not show that the Court valuers were in the habit of acting, or had acted, on erroneous principles.

APPEAL by the landlords asking that the order of the Irish Land Commission, dated the 20th November, 1900, might be reversed, and that in lieu thereof it might be declared that the evidence given on behalf of the landlords established that the Court valuers named in the order had been in the habit of valuing land upon erroneous principles, and had in the several cases named in the title hereof valued on erroneous principles, and that it might be ordered that the reports of the said Court valuers should not be received in determining the fair rents of the holdings held by the said tenants under the landlords named in the title hereof.

(1) Before PALLES, C.B., and FITZ GIBBON, and WALKER, L.JJ.

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1901.
GOSFORD,
Landlord;
ALEXANDER
AND OTHERS,
Tenants.

The order appealed from was made by the Irish Land Commission on the occasion of a sitting held at Armagh for the purpose of receiving evidence pursuant to the answers of the Court of Appeal to the case stated for their decision, the judgment in which is already reported as *Trench v. O'Regan* (1), and by this order the Irish Land Commission declared its opinion that the evidence of Henry Augustus Johnston given at the said sitting did not establish that Messrs Morony and Callwell had been in the habit of valuing land, or had in any of the cases named in the title hereof valued land, upon erroneous principles, and accordingly the Court declared that the reports of the said Messrs. Moroney and Callwell, as Court valuers in the several cases in the title hereof named, should be received and considered by the Court notwithstanding the said evidence.

At the hearing Mr. Henry Augustus Johnston, on behalf of the landlords, deposed that some time previously he had met Messrs. Moroney and Callwell on the farm of a man called O'Hanlon, which they were then engaged in valuing, and had some conversation with them. He told them that a short time previously Rice's farm—which immediately adjoined O'Hanlon's farm, and which he pointed out to the valuers—had been evicted; that the landlord for whom he was agent had got it into his hands; that it contained 13 acres; that the old rent was £13; that the landlord re-let it at £13 to a solvent tenant, who held another farm on a different part of the estate, and who paid a fine of £36 13s.; that Mr. Callwell thereupon replied in the presence of Mr. Moroney that "the letting value of the land did not influence them; all they could go by was what in their opinion the tenant could make out of the land." The witness also stated, "Mr. Callwell told me that he could take me to places in England where he could show me land with good buildings on it which would let at 10s. an acre, and he could take me to places in Donegal where the land was £4 an acre . . . The circumstances of the district, what the land would let for in the district, did not influence them. The only consideration they took into account was what in their opinion the tenant could make out of the farm."

(1) [1901] 1 I. R. 274.

Neither O'Hanlon's nor Rice's farm was amongst the number of those at present before the Court, but it was contended on behalf of the landlords in the cases in respect of which the said case was stated that this evidence of Mr. Johnston showed that the above-named valuers were in the habit of acting on erroneous principles. The Land Commission Court—Meredith, J., Mr. Commissioner Wrench, and Commissioner the Hon. Gerald Fitz Gerald, Q.C.—held that there was no evidence that the valuers acted on erroneous principles, and made the order from which the landlords now appealed.

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1901.

GOSFORD,
Landlord;
ALEXANDER
AND OTHERS,
Tenants.

Ronan, Q.C., and Cherry, Q.C. (with them C. Murphy), for the landlords.

Megaw, for one of the tenants.

PALLES, C.B. :—

Feb. 25.

The only question upon this appeal is whether there is evidence that the Court valuers, in valuing the holding in question, acted upon erroneous principles. The Land Commission held that they did not, and the landlord, by the leave of the Commission, has appealed from that decision.

The evidence relied on in support of the affirmative of the proposition was that one of the valuers, Mr. Callwell, when valuing the farm, was (most improperly in my opinion) pointed out by Mr. Johnston, the agent of the appellant, an adjoining farm, was told its acreage, the rent at which it had been then lately set, and the gross sum which the tenant had paid on entering. Mr. Callwell stated, in substance (1), that the only thing they took into consideration was what, in their opinion, the tenant could make out of the farm; and (2), that what land would let for in the district, and that the circumstances of the district (which must be taken to mean the circumstances of the district so far as they did not affect the amount the tenant could make out of the farm) did not influence them.

Mr. Justice Meredith, in a well-considered and most able judgment, has stated his reasons for holding that these facts did not constitute evidence in support of the proposition contended for.

Appeal. In that conclusion, and in the reasons by which he arrived at it,
 1901. I entirely concur. It will probably, however, be considered
 GOSFORD, satisfactory that I should formulate my view in my own words.
 Landlord;
 ALEXANDER The first of these statements, deposed to have been made by
 AND OTHERS, Mr. Callwell, to my mind fairly describes the economic rent of a
 Tenants. farm, the excess of the price of the produce of the farm over the
 Palles, C.B. cost of the production on that farm; and the sum so ascertained
 would, in my opinion, be that at which a valuer, valuing as
 between landlord and tenant, should fix the rent.

I desire to deal with the second statement a little more in detail, as the argument in reference to it, to my mind, fails to distinguish between the duties of the Land Commission or Sub-Commission on the one hand, and those of the Court valuer upon the other. The former are judicial officers; they have a power and a duty to hear evidence upon oath. The other has no power to hear evidence. He is one of those who "must determine the whole matter by the use of their own eyes, knowledge, and skill" (1). The Land Commission may receive evidence of the rents of and of the sums received on lettings of adjoining lands if such lands are proved to be of the same quality as those of the farm under valuation, or if evidence be given by which the respective values of the farms can be compared. A valuer has no such power; and in my opinion it is, in the last degree, to be deprecated that anyone, be he landlord, agent, or tenant, should presume to make statements to a Court valuer calculated to affect his valuation. My objection to such conduct is not alone when it is, as it was in the present case, made *ex parte*, in the absence of the other party; I would object to it were both parties present, and if the one had an opportunity of contradicting the other. Nothing could be more unseemly, more calculated to bring the administration of this Act into disrepute, or more illegal, than such conduct, and I shall only add that had Mr. Callwell given a hair's weight to the statement of Mr. Johnston he would have violated his duty, and his report could not have been adopted.

Reliance has been placed by Mr. Ronan upon a passage from the judgment of Holmes, L.J., in *The Queen v. Irish Land Com-*

mission (1). "A qualified valuer," says the Lord Justice, "ought to have the technical skill to know the productive capacity of the soil, the cost of production, and the price of produce. He ought also to have such experience as to enable him to understand the circumstances of the holding and district, including, of course, a knowledge of the rents generally paid therein."

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AND OTHERS,
Tenants.
Palles, C.B.

I have said that a valuer is to determine the whole matter by the use of his own eyes, knowledge, and skill. Now, if by former experience he has acquired a knowledge, not merely of the rent paid for one particular farm, but, in the words of the Lord Justice, "of the rents generally paid therein," it is part of his knowledge. It may be an element which would assist him in arriving at a determination of the amount which the tenant should be able to make out of the farm, and may, if he think proper, be taken into consideration by him. In my opinion, however, it can be so considered only when it is part of his own antecedent knowledge—when, to again refer to the language of the Lord Justice, it has become part of his mental equipment. It cannot be the result of inquiries made for the purpose.

So far for this particular case and the decision appealed from. In reference to the general application of the decision in *Trench v. O'Regan* (2), I have had the advantage of reading the judgment which will be delivered by my brother Fitz Gibbon, and I desire to say that I entirely concur in it.

I hold that in some cases it *may* be necessary to examine a Court valuer, not as to the details of his valuation or the principles upon which he acted, but to rebut untrue evidence of statements made by him which, if true, would be evidence that erroneous principles had been acted upon by him either in his valuations generally or on that of the particular farm under consideration. No one is above misrepresentation; and if such evidence as I have mentioned were given, I should think that the valuer not only might be called, but in justice to the party who desired his report to be adopted ought to be called, although by being called he would be subjected to cross-examination. The order of the Land Commission must be affirmed, and the appeal dismissed, with costs.

(1) [1899] 2 L. R. Ir. 444.

(2) [1901] 1 I. R. 274.

Appeal.
1901.

GOSFORD,
Landlord;
ALEXANDER
AND OTHERS,
Tenants.

FITZ GIBBON, L. J. :—

I concur with the Lord Chief Baron ; but having been a party to the decision of the Court in *Trench, landlord, O'Regan, tenant* (1), I think it my duty to add some observations upon the present case, especially because the Land Commission, by giving leave to appeal, has indicated a wish that its order should be fully discussed here.

In *Trench's case* (1) I stated that we did not decide that any of the evidence then proposed would, if actually tendered, have been admissible, or would have amounted to legal evidence at all, but I was forced to answer the question put upon the special case as I did, because the description of the evidence which was offered and rejected was wide enough to include admissible evidence upon issues which I held to be legitimate subjects for evidence.

What are those issues? The Land Act, 1881, sect. 48 (4), empowers the Land Commission to obtain, in the form of reports, the *opinions* of independent valuers upon matters referred to them, and the Commission may or may not, as it thinks fit, adopt these reports. I held in *Trench's case* (1), and I repeat now, that it is the right of any party affected by one of these reports to require the Land Commission to receive any legal evidence tending to impeach the opinion therein contained. It may be impeached by proof either that the valuer formed his opinion upon erroneous principles, or that he formed it upon mistaken assumptions of fact or upon illegal or inadmissible evidence, or that it was not an honest, a just, or a competent opinion. I hold that the Land Commission cannot limit the production of legal evidence upon any of these points, or interpose any supposed privilege or protection between the report which the Commission is empowered to adopt, and any legal evidence tending to impeach it as a just foundation for the judgment which the Act authorizes the Commission to form with the aid of the report.

But what is, or is not, legal evidence can be determined only upon the consideration of what is tendered in each case. Speaking generally, I hold that the valuers' reports are impeachable by anything and by everything which would be admissible under

our law as evidence to impeach the testimony of any ordinary witness, or the opinion of any ordinary expert, or the award of any ordinary arbitrator, for, in my opinion, the valuers' reports are, in some respects, and for our present purpose, analogous to all three. Evidence cannot be rejected of any statement made by a valuer which is relevant to his report, and either is inconsistent with that report or tends to prove that it is founded on any error or mistake, either of law or fact, or that it is not an honest, just, and competent opinion. If at any defined time or place, I care not when or where, a valuer has stated the principles on which he acts in general, or has acted in the particular case, or has made an admission, or has otherwise supplied evidence against himself, affecting his report, of anything wrong in his conduct, his methods, his premises, or his conclusion, the party interested is, in my opinion, entitled, as of right, to prove such matter before the Land Commission, and it is no answer to this right to say that it would be inconvenient to receive such evidence, or that its reception might necessitate the production of the valuer, and even his submission to cross-examination as an ordinary man, to contradict, to explain, or to clear up what was alleged against him.

When *Trench's case* (1) was before us, the landlord's counsel urged that they had been prevented from giving evidence of errors in principle and of bias and prejudice. But if the evidence offered in the present case had been allowed to be tendered in that case and had been rejected, I should, without hesitation, have held that it was rightly rejected, because it did not amount to any legal evidence to impeach the reports of the valuers to which it applied.

I have carefully read the evidence of Mr. Johnston, to which alone our attention has been directed as supporting the appeal, and I agree with all that Meredith, J., has said as to that evidence. Mr. Johnston had no right to "interview" the valuers as he did. They were under no obligation to answer his questions, and they could not receive or act upon his statements as lawful material for the opinions which it was their duty to form, or for the

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1901.

GOSFORD,
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Landlord;
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L.J.

reports which it was their duty to make. The impeachment has narrowed itself to a single conversation between Mr. Johnston and Mr. Callwell. That gentleman might have been more prudent if he had followed the example of his colleague, and had said nothing to Mr. Johnston. But incaution often leads to self-crimination, and, acting on the principle which I have endeavoured to state, I treat Mr. Callwell's statement as admissible evidence against him. But the question remains, "Does that statement evidence any erroneous principle of valuation, or the rejection by Mr. Callwell of any legitimate element from the materials for his opinion as to the fair rent of the holding upon which he was reporting at the time?" In my opinion it does not. The statement is in two parts—one affirmative, the other negative. He said affirmatively "that the only thing they took into consideration was what, in their opinion, the tenant could make out of the farm." If a valuer could ascertain, in moneys numbered, how much "the tenant could make out of a farm," this would, in my opinion, be the economic rent, and, if he took all legitimate considerations and allowances into account, and by "the tenant" meant not the particular individual, but any occupying tenant working the holding with reasonable skill and industry, it would also be "the fair rent;" at least it is as nearly a definition of a fair rent as I have yet met. Mr. Callwell gave no further affirmative statement of his principles of valuation. His negative statement amounted, on my interpretation of his words, only to a rejection of information about other holdings which were not within the reference to him. This information he had no means of verifying and no jurisdiction to investigate, and the considerations suggested by it could not be tested as to their applicability to the case before him. It was for the Land Commission, and not for the valuer, to enter upon these topics and to take evidence about them. Therefore, there is no evidence that Mr. Callwell rejected anything which it was his duty to consider.

I quote, in conclusion, some passages from the judgment of Meredith, J., which are fully supported by the report of the evidence, and which it is only just to the Land Commission to mention. They show that the principle of our former decision has been followed, and that the dismissal of this appeal is in no

degree inconsistent with the attainment of the objects of that decision. He says, "When evidence is tendered that they (the valuers) have acted on erroneous principles, . . . we will not only receive evidence, but we will weigh and consider it as carefully as we have done in the present case." As to what occurred in this case, he says, "I would gather from the evidence of Mr. Johnston himself that what they refused to do was to take notice of mere *ex parte* statements made on the lands to them, not on oath, and which they have no opportunity of weighing in any possible way. . . . They would be doing, in acting on such statements, the very thing which, in my opinion, would be open to the strongest condemnation." . . . "We send valuers, and skilled valuers, to report to us. We do not send them, nor ought we to send them, to hold a Sub-Commission Court upon the lands, differing from a Sub-Commission in this, that the evidence as regards the letting value of lands in the neighbourhood is to be taken, not on oath, but haphazard either from landlord or tenant." Lastly, he says, "Mr. Johnston could have given, as *he did give*, evidence in Court as to the circumstances of the neighbouring holdings." I beg to express my full approval of these observations. They indicate satisfactorily to my mind the appreciation by the Land Commission of the respective functions of the valuers and of the Commission itself; and they indicate also the unfounded character of this appeal, which must, accordingly, be dismissed with costs.

Appeal.
1901.

GOSFORD,
Landlord;
ALEXANDER
AND OTHERS,
Tenants.

Fitz Gibbon,
L.J.

WALKER, L. J. :—I concur.

Solicitors for the landlords : *Monroe & Anderson.*

Solicitors for the tenants : *Peel, Harris, Duff, Farrell, Lavery,
& Blacker.*

G. Y. D.

V.-C.
1901.

TAAFFE v. TAAFFE.

(1878. No. 501.)

Dec. 9, 13.

1902.
Feb. 28.

Administration suit—Executor—Right of retainer—Receiver—Rents collected by—Funds transferred from other matter.

An executor, also a creditor of his testator, *held*, in an administration action, not entitled to a right of retainer in respect of his debt out of rents of a chattel real collected by a receiver and lodged by him to the credit of the action, but entitled to such right out of a sum lodged in Court under the Trustee Relief Act (11 & 12 Vict. c. 68), to which the testator was entitled in remainder, and which, having fallen into possession after his death, was, in presence of the executor, transferred to the credit of the action.

MOTION.

Philip Taafe, being entitled to certain estates held in fee, to the lands of Woodfield held for a term of years, and to reversionary interests under the will of James Taafe, senior, deceased, in funds which had been lodged in Court under the provisions of the Trustee Relief Act (11 & 12 Vict. c. 68), made his will dated the 19th December, 1870, and thereby devised and bequeathed all his property to James Taafe, as to Woodfield upon certain trusts mentioned, and as to the residue of his property upon trust to sell and to hold the proceeds for the purposes specified; and he appointed James Taafe his executor.

The testator died on the 14th January, 1871. Probate was granted to James Taafe.

Most of the realty was subject to mortgages, one of which was a mortgage from the testator to James Taafe containing a covenant to pay.

Woodfield was subject to a mortgage from the testator to Maxwell Simpson, also containing a personal covenant.

On the 9th February, 1871, James Taafe presented a petition for sale of the real estate in the Landed Estates Court, and an order for sale was made thereon. An order for a receiver was subsequently made by the Land Judge.

On the 27th August, 1878, Maria Taafe, a beneficiary under the will, commenced this action against James Taafe and the Attorney-General for the administration of the testator's real and personal estate, and on the 4th July, 1879, a primary judgment was pronounced.

By an order in the action dated the 27th July, 1880, and made on consent, the receiver was extended to the action, and he was appointed receiver over the lands of Woodfield.

Maria Taafe died on the 3rd September, 1882. Her administrator was Henry Taafe Ferrall, and the action was continued by him as plaintiff.

James Taafe died on the 31st October, 1895, having made a will, of which he appointed William Fry the executor. William Fry obtained probate on the 13th January, 1896, and the action was continued against him as a defendant.

By an order of the Land Judge, dated the 6th February, 1896, made on the application of Henry Taafe Ferrall, reciting the death of James Taafe trustee of the will of Philip Taafe, and that the tenants were refusing to pay their rents to the receiver, it was ordered that the applicant be at liberty to take all necessary steps to appoint a new trustee of the will, and be at liberty to attend the receiver business in connexion with the real and leasehold estates.

By an indenture dated the 15th February, 1896, and made between William Fry of the one part, and Henry Taafe Ferrall of the other part, reciting the will and death of Philip Taafe, and grant of probate, that James Taafe had presented the petition for sale, that portion of the real estate had been sold and the proceeds applied in discharge of incumbrances, and that portion remained unsold, the appointment of the receiver over the real and leasehold estate, the institution of the present action, the will and death of James Taafe, and grant of probate of his will, William Fry appointed Henry Taafe Ferrall to be a trustee of the will of Philip Taafe in place of James Taafe, and as trustee granted to him the premises in the first part of the schedule thereto, being the portion remaining unsold of the real estate, to hold upon the trusts of the will, and as trustee assigned to him the premises comprised in the second part of the schedule, being the leasehold estate of

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the testator, and then vested in William Fry, to hold upon the trusts of the will. In the first part of the schedule the real estate was described. The second part contained a description of the Woodfield property, with the addition "and all rents now due out of any of the before mentioned lands, and all claims, if any, of the said William Fry as trustee upon any funds, dividends, and cash in the Courts of the Land Judges and Vice-Chancellor respectively in the action and matter aforesaid."

By the death of Johanna Taaffe in 1891 the estate of Philip Taaffe had become entitled to portion of the funds to the credit of the Trustee Relief Act matter, and by an order of the Master of the Rolls, dated the 26th October, 1896, and made in that matter, on the application of Henry Taaffe Ferrall, as trustee of the will of James Taaffe, senior, the solicitors for the executor of James Taaffe attending, the Accountant-General was directed to carry over that portion with cash accumulations to the credit of the present action.

Another indenture dated the 26th October, 1897, and made between the same parties, was indorsed on that of the 15th February, 1896. It recited that doubts had arisen as to whether the rents, funds, dividends, and cash mentioned at the end of the second schedule to the first deed had been thereby effectually assigned to Henry Taaffe Ferrall, and to get rid of any such doubt the parties had agreed to execute the assignment therein-after contained, and by it William Fry, as personal representative of James Taaffe, assigned and confirmed to Henry Taaffe Ferrall all rents and arrears of rents remaining due at the execution of the first deed out of the lands and premises comprised in the first and second schedules to the same or any of them or any part thereof, and all claim, if any, of the said William Fry upon any funds, dividends, and cash in the Courts of the Land Judges and Vice-Chancellor in the matter and action then pending in the said Courts as in the first deed particularly mentioned, and all other, if any, the real and personal estate of the said Philip Taaffe then vested in the said William Fry, as personal representative of the said James Taaffe, to hold upon the trusts applicable thereto under the will of Philip Taaffe.

By the death of Julia Taaffe on the 6th August, 1897, the

estate of Philip Taaffe became entitled to further portion of the funds to the credit of the Trustee Relief Act matter, and by an order of the Master of the Rolls, dated the 30th November, 1897, made on the application of Henry Taaffe Ferrall, as trustee of the will of James Taaffe, senior, the solicitors for William Fry attending, the Accountant-General was directed to carry over that portion with cash dividends to the credit of this action.

Henry Taaffe Ferrall died on the 25th August, 1898. His executors appointed Gerald More O'Ferrall a new trustee of the will of Philip Taaffe.

The action was continued in the names of Alicia Keenan and others, creditors of Philip Taaffe, as plaintiffs.

By the Chief Clerk's certificate, filed on the 29th June, 1900, (amongst other creditors) William Fry, as executor of James Taaffe, was found to be a simple contract creditor for £124 14s., and a creditor for £6225 18s. on the testator's covenant in the mortgage to James Taaffe; the present plaintiffs were found to be creditors for £1199 2s. 6d. on foot of a bond by the testator, and for £1250 on foot of his covenant in the mortgage by him to Maxwell Simpson of the lands of Woodfield; and the personal estate outstanding was found to consist of £4657 19s. 1d., new Consols, and £61 18s. 4d. cash in Court to the credit of the action, and the Woodfield property.

William Fry, as executor of James Taaffe, claimed a right of retainer in respect of his debts, and by the judgment on further consideration, dated the 5th December, 1900, an inquiry was directed of what particular sums the Consols and cash in Court consisted, and whence same were derived, and all questions as to the right of retainer by the late James Taaffe were directed to stand over pending the result of that inquiry, with liberty to apply.

By certificate of the Chief Clerk, filed on the 20th July, 1901, it was found that of the Consols the sum of £2425 16s. 11d. consisted of rents of the Woodfield property from time to time lodged by the receiver and invested; that the further sum of £372 7s. 7d. Consols and the sum of £37 3s. 10d. cash consisted of dividends thereon; that the sums of £740 12s. 5d. and £967 10s. 8d. Consols were the funds transferred by the Rolls orders of the 26th

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October, 1896, and the 30th November, 1897, respectively; and that the residues of the Consols and cash consisted of dividends on the last mentioned two sums.

This was an application by the plaintiffs to have the question (amongst others) of the executor's right of retainer determined.

O'Connor, K.C. (with him *M'Cann*), for the plaintiffs:—

There could be no right of retainer as regards rents collected by the receiver—the right to retain does not extend to assets not got in by or come to the hands of the executor: 1 Wms. Exors. (9th Ed.), 887; *In re Jones* (1); *In re Harrison* (2); *In re Rhoades* (3); *In re Compton* (4). *Richmond v. White* (5) is not an authority to the contrary: see the judgment there (p. 362) of Cotton, L.J.

With respect to the funds transferred under the Rolls orders, those funds were never actually or constructively in the executor's possession; they were carried over on the application of Henry Taaffe Ferrall, and the executor has no right of retainer: *Pulman v. Meadows* (6). Moreover, when the orders for transfer were made, William Fry had already, by appointing the new trustee and transferring the property to him without reserving or asserting any right of retainer, deprived himself of the title to receive those funds, and so rendered it impossible for him to have any right of retainer in respect of them. In *Richmond v. White* (5) the payment into Court by the Insurance Company was treated as a payment by the executor.

T. P. Law, K.C., and *Matheson, K.C.* (with them *Leech*), for William Fry:—

The receiver was appointed under special circumstances. James Taaffe, as trustee for sale of the real estate, took proceedings in the Landed Estates Court, and a receiver was there appointed over the freehold property. When this action was instituted the receiver was extended to it, and it was considered desirable to appoint him receiver over the chattel interest also: the order effecting this was made on consent. The foundation of the argu-

(1) 31 Ch. D. 440.

(2) 32 Ch. D. 395.

(3) [1899] 2 Q. B. 317

(4) 30 Ch. D. 15.

(5) 12 Ch. D. 361.

(6) [1901] 1 Ch. 233.

ment on the other side is the case of *In re Jones* (1); but the decision in that case is based not on any decision, but almost entirely on a mere dictum of Cotton, L.J., in *Richmond v. White* (2), interjected in the argument and unnecessary for the decision of the question in issue. Kay, J., decided *In re Jones* (1), as he did with reluctance and against his own opinion: see his judgment, pp. 443, 444. The true view is that a receiver is appointed by the Court to protect the property for the benefit of the persons entitled. The judgment of Cotton, L.J., in *In re Compton* (3), is inconsistent (see p. 19) with his dictum in *Richmond v. White* (2), and he does not refer to the latter. See also *Simpson v. Simpson* (4); *Johnson v. Langley* (5); *In re Lance* (6).

As regards the funds transferred in 1896 and 1897, William Fry is returned as entitled to his debt by the Chief Clerk's certificate, which was long subsequent to the deeds appointing the new trustee. The deeds did not include those funds. When the transfers were made, the personal representative of Philip Taaffe was the only person who could give a receipt for those sums. *Richmond v. White* (2) is identical with this case. Payment into Court does not prevent retainer: *Chisum v. Dewes* (7).

Pierce Nolan, for Gerald More Ferrall.

McCann, in reply:—

Even irrespective of the question on the deeds, there is no right of retainer with respect to the funds transferred: *Pulman v. Meadows* (8). In the case of *In re Compton* (3) the money was paid directly into Court by the executrix.

THE VICE-CHANCELLOR:—

This suit was one for the administration of the real and personal estate of Philip Taaffe at the suit of a legatee, and has been regularly prosecuted, and a judgment obtained on further consideration on the 5th December, 1900. Philip Taaffe was possessed of an estate held by lease for years of lands called

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(1) 31 Ch. D. 440.

(2) 12 Ch. D. 361.

(3) 30 Ch. D. 15.

(4) [1895] 1 I. R. 530.

(5) 68 L. J. (Ch.) 351.

(6) [1900] W. N. 29.

(7) 5 Russ. 29.

(8) [1901] 1 Ch. 233.

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Woodfield. These lands were subject to a mortgage thereon created by him for £1500, of which £250 was paid off. A receiver was appointed in this suit by order of 27th July, 1880, and by a subsequent order, on the application of the mortgagee, dated the 18th July, 1881, the receiver was directed to pay to the mortgagees the interest on the mortgage, which he accordingly did from time to time. The rents were sufficient, after payment of outgoings, to pay not only the interest on the mortgage, but to leave a considerable balance in the receiver's hands. These balances the receiver brought in from year to year on the passing of his accounts to the general credit of the action, and it is as to sums so brought in that the first question arises. That question is whether the executor of the will of Philip Taaffe, who is also a creditor of his to a large amount, is entitled to retain his debt out of the rents so brought in, and which still remain in Court to the general credit of the action. There is no doubt that the rents so brought in and invested were, and are, personal estate of Philip Taaffe. If these funds had been received by the executor and remained in his hands, he would have been entitled to retain them towards payment of his debt against all creditors of equal degree. But they never actually came to his hands, as they were received by the receiver, and were brought in by him without passing through the hands of the executor, and remain in Court to the general credit of the action. Many questions have arisen and been decided respecting the rights of the executor to retain his debt, and especially as to what is meant by coming to the hands of the executor. One general principle pervades them, namely, that where there is no possession by the executor there can be no retainer, for no one can keep what he has not got. This possession, however, is not confined literally to the actual receipt of the personal estate sought to be retained by the executor, but extends to all that has been received for his use, and has been thus potentially his as executor. Thus money lodged in bank to the credit of the executor, and payable to him or to his order, is deemed to have come to his hands. The rule in such cases is, in my opinion, that personal estate which is at the absolute disposal of the executor, without the consent of any other person, is subject to his right of retainer. The fact of his paying into Court personal

estate which was received by him does not deprive him of the right of retainer. But it is essential, in order to give effect to this right, that the personal estate in question should have actually or potentially come to his hands, and must so exist at the time when it becomes necessary for him to exercise his right. Another requirement is that the personal estate out of which the right of retainer is claimed must have been so received in the life of the executor.

In the present case the first question arises as to the moneys brought in by the receiver out of the rents of Woodfield. These moneys never were received in any sense by the executor. The receiver was appointed to get in those rents as the act of the Court, and not on the authority of the executor. The receiver had authority from his office to receive payment, and he obeyed the orders of the Court, and not of the executor, in bringing in the overplus, after payment of the interest due to the mortgagee, to the general credit of the action. Under these circumstances, I am of opinion with Kay, J., in *In re Jones* (1), and Pearson, J., in *In re Harrison* (2), that the executor has no right of retainer.

There is also in Court a sum of £1768 3s. 1d. Consols, which was not derived from the rents of Woodfield, nor brought in by the receiver. It was a sum which had been brought into Court under the Trustee Relief Act by the representatives of another James Taaffe, who had bequeathed it to two legatees for life, and on the death of the survivor of them a moiety of the fund became the property of Philip Taaffe absolutely. The person legally authorized to receive it was the personal representative of Philip Taaffe, whose assets are being administered in this action. It was part of the outstanding personal estate of Philip, which the executor of Philip alone could give a legal discharge for. It was on the motion either of the executor of Philip, or with his privity or consent, that it was carried over to the credit of the action. It never got into the hands of any other person, and was carried over by orders of the Rolls Court to the general credit of this action.

In my opinion this dealing with the fund is equivalent to an

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TAAFFE. actual payment to the executor and a lodgment in Court by him. This view was strongly expressed by Cotton, L.J., in *In re Compton* (1), where he says that where money has been paid into Court during the life of the executor the Court does not withdraw from the executor his right in respect of that money. The Court treats that payment into Court as in effect a payment into the executor's own hands. So here I am of opinion that by the order at the Rolls, transferring this fund to the credit of this action, which must have been done either on the motion of the executor or with his assent and concurrence, the right of the executor to retain his debt has not been prejudiced, and must be given effect to.

I therefore hold that as to this fund the executor is entitled to retain his debt against all creditors of equal degree.

But it was contended by counsel for the plaintiffs that if the executor had this right of retainer, he lost it by the execution of the deeds of 15th February, 1896, and the 26th October, 1897. It did not appear very clearly what the purpose was for which they were executed. It did not appear that there was any intention to deal by them with the rights to this fund to the credit of Taafe's Trusts and the Trustee Relief Act. It was said that the only object of the former of these deeds was to appoint a new trustee in the place of a deceased trustee of the lands of Woodfield, and some real estate of James Taafe, for the purpose of a sale of the same in a matter in the Court of the Land Judge, and that the later was merely to remove some doubt or correct some error in the earlier deed. It has not been shown to me that they have any operation on the question of retainer.

I am, therefore, on the whole case of opinion that the executor has no right of retainer of his debt out of the funds received by the receiver out of Woodfield; and, secondly, that the executor has the right to retain his debt out of the fund brought over from Taafe's Trusts and the Trustee Relief Act matter so far as it will extend.

Solicitor for the plaintiffs and Gerald More O'Ferrall:
O'Hagan.

Solicitors for William Fry: *Anderson & Bland.* D. M'C. M.

EX PARTE THE LURGAN URBAN DISTRICT COUNCIL;
IN RE KEARNS.

M. R.

1901.

Dec. 19.

Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), sect. 80—Administration obtained, after payment of money into Court, for the purpose of making title—Colonial administrator—Power of attorney—Grant of administration in Ireland—Assets—Real estate—Estate duty payable in respect of purchase money of lands compulsorily taken.

An urban district council compulsorily acquired a part of certain freehold lands to which K. was entitled in fee, subject to a life annuity charged thereon. The arbitrator awarded the sum of £385 as compensation for the premises compulsorily taken. After the date of the award K. died in Australia, having by his will devised and bequeathed all his real and personal estate to a trustee in trust to sell and hold the proceeds of the sale in trust for an Australian charity. Administration of the estate of K., with the will annexed, was granted in Australia. After K.'s death the sum of £385, representing the purchase-money of the premises compulsorily taken, was lodged in Court. Administration of the estate of K., with the will annexed, was granted to A. in Ireland, who had been appointed by the Australian administrator his attorney for the purpose of taking out administration in this country and to collect the assets and other property of K. Estate duty was paid by A. on the unsold real estate of K., the fund in Court as representing the premises compulsorily purchased and some book debts due to the deceased. On the application of A. it was ordered that the money in Court should be paid out to him, and that the urban district council should pay all costs properly and necessarily payable:—

Held, that the costs of the power of attorney from the Australian administrator, the costs of the grant of administration in Ireland, and the portion of the estate duty applicable to the purchase-money of the lands compulsorily taken were properly payable by the urban district council.

SUMMONS to review taxation.

This was an application on the part of the Lurgan Urban District Council for an order that certain items allowed by the Taxing Master, in reference to the costs of a power of attorney, and the costs of taking out administration in Ireland to John Kearns, deceased, and in reference to a sum paid in respect of of estate duty, should be disallowed.

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The material facts of the case were as follows:—John Kearns was entitled in fee-simple to certain freehold premises in the town of Lurgan, subject to an annuity charged thereon in favour of his mother during her life. On 28th December, 1896, the Lurgan Urban District Council served notice of intention to take compulsorily a portion of these premises. An arbitrator was appointed to assess compensation in respect of the compulsory acquisition thereof; and he made his final award on 22nd July, 1898, by which he awarded £385 5s. 6d. as compensation for the portion of the premises taken.

By his will, dated 30th November, 1895, John Kearns, who was then residing in Australia, devised and bequeathed all his real and personal estate to the Honorary Secretary for the time being of the Immigrants' Aid Society at Melbourne, upon trust to sell and dispose of same, and stand possessed of the proceeds of such sale, upon trust for the said Immigrants' Aid Society, and he appointed the secretary of the society for the time being the executor and trustee of his will.

John Kearns died 5th February, 1899, and the executor appointed by his will having died without proving it, letters of administration of his estate, with the will annexed, were granted to William Hartnell by the Supreme Court of the Colony of Victoria in its probate jurisdiction.

On 16th June, 1899, the Lurgan Urban District Council lodged in Court the sum of £385 5s. 6d., being the amount awarded by the arbitrator in respect of the premises compulsorily taken, and there was in Court on the 19th March, 1901, standing to the credit of the matter, the sum of £380 16s. 7d. 2½ per cent. New Consols, and the sum of £9 19s. 11d. cash.

On 30th January, 1900, William Hartnell (the Australian administrator) appointed Henry Geare and another his attorneys and attorney for the purpose of obtaining a grant of administration of the estate of John Kearns in Ireland, and to collect his assets and other property.

On 31st July, 1900, letters of administration of the personal estate of John Kearns, with the will annexed, were granted to Henry Geare forth of the Principal Registry of the Queen's Bench Division of the High Court of Justice in Ireland.

Estate duty was paid by Henry Geare, as the Irish administrator of John Kearns, on the unsold real estate, on the money lodged in Court, and on certain small sums of money estimated to be due to the deceased at the date of his death. The schedule of assets stated that the personal property of the deceased consisted of the money fund in Court and these book debts.

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By order of the Master of the Rolls, dated 19th March, 1901, it was ordered that the funds in Court should be sold and paid out to Henry Geare, and that the Lurgan Urban District Council should pay all costs properly and necessarily payable, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, and the several Acts incorporated therewith, when taxed and ascertained.

This order was made on the consent of Mrs. Kearns, who was entitled to a life annuity charged on the lands.

C. Murphy, in support of the application :—

The costs of the power of attorney, and the costs of taking out administration to John Kearns, are not payable by the urban district council under the order of 19th March, 1901, because they are not costs of proceedings solely necessary for the payment of the money out of Court. The present case is different from *Ex parte Rorke* (1) and *Ex parte Kelly* (2).

There was no conversion of the real estate, because John Kearns died previous to the lodgment of the purchase-money in Court. Moreover, the lands were subject to and charged with a life annuity in favour of another. Consequently, the money in Court represents real estate, and formal probate of the will was not necessary to make title.

No portion of the estate duty paid by the Irish administrator is chargeable against the urban district council because the duty was paid for the general purposes of the estate and not for the particular purpose of drawing the money out of Court.

Brunskill, for the administrator, Henry Geare :—

In a compulsory purchase under the Lands Clauses Consolidation Act, 1845, all these costs are properly allowable. John

(1) [1894] 1 I. R. 146.

(2) 31 L. R. Ir. 137.

M. R. Kearns died after the arbitrator had made and published his award, 1901. but before the amount of the purchase-money was lodged in Court. *Ex parte LURGAN* *U. D. C.*; *In re KEARNS.* *In re Wootton's Trusts* (1) decides that, where a vendor dies after the date of the award fixing the value of real estate compulsorily taken, the purchase-money must be dealt with as personalty. It was therefore necessary that letters of administration to John Kearns' estate should be taken out in this country before the fund would be paid out of Court. As the Australian administrator was not resident in this country, he had to send over a power of attorney, and the costs of this power of attorney are properly allowable : *In re Godley* (2).

Even if there was no conversion, and the purchase-money must be dealt with as realty, the course that has been adopted, of proving the will in this country by means of a power of attorney, is far cheaper than bringing the witnesses to the will over from Australia. *Ex parte Rorke* (3) decides that the costs of administration, so far as administration is necessary for the purpose of making title, are allowed on taxation. See also *Ex parte Keatley* (4), and *Ex parte Kelly*. (5)

The proportion of estate duty applicable to the fund in Court which was paid by the Irish administrator should be allowed as part of the costs of administration, as the applicant might have been satisfied with a holding title, and would not have been compelled to take out administration and to pay estate duty if the urban district council had not compulsorily acquired his land.

THE MASTER OF THE ROLLS :—

The lands compulsorily taken by the Lurgan Urban District Council were portion of freeholds held in fee-simple. Under the will of John Kearns, who died in Australia on 5th February, 1899, an Australian charity called the Immigrants' Aid Society became entitled to the lands excepting that portion granted to the Lurgan Urban District Council. The arbitrator had originally awarded £202 15s. 10d. as compensation for the portion of the lands that

(1) 1 N. R. 193.

(2) 10 Ir. Eq. R. 222.

(3) [1894] 1 I. R. 146.

(4) 25 L. R. Ir. 265.

(5) 31 L. R. Ir. 137.

was taken, but this was subsequently increased to £385 5s. 6d. That sum was paid into Court, and the Immigrants' Aid Society could not draw it out of Court without making title to it: and to prove title evidence of the will of John Kearns was necessary. His will was proved in Australia and not in this country; and the obligation was cast on the society of producing evidence of its execution. If Mr. Murphy is right in his contention, there was no conversion by reason of the taking of the lands, as John Kearns died before the purchase-money was lodged in Court. Still it would be necessary to prove the will. That could be done in two ways; either by making use of the probate granted in the colony and having it re-sealed in this country, or by having it proved here as a will of real estate, in which case it would be necessary to bring over a couple of witnesses from Australia to prove the execution of the will as a devise of real estate; and that would have cost the urban district council a great deal more than the course which has been adopted. To get the money out of Court one of these two courses had to be adopted, though neither was necessary in order to preserve a good holding title in the society. As part of the arrangement to take out letters of administration a power of attorney was sent home by the Australian administrator, couched in general terms, and a good deal of it is no doubt not necessary for the purpose it was intended to serve, which was to obtain a grant of administration in this country. As regards taking out letters of administration in Ireland, that step was clearly necessary whether the money in Court represented real or personal estate, for otherwise the society could not draw it out.

The costs of the power of attorney and the costs of taking out letters of administration to John Kearns must be allowed.

As regards the other question, I have the inventory of assets before me, and I find that the Irish administrator had to pay duty to the amount of £14 16s. 3d.; and I am asked to infer that this sum was paid by him for the general purposes of the estate. I cannot do so. In the schedule of assets the only personal estate (except some book debts) is stated to be the money which has been lodged in Court as representing the purchase-money of these lands taken by the urban district council. The testator had no other personal

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estate on which estate duty was paid. There was real estate belonging to him, and none of the estate duty paid in respect of that portion of the real estate which was not taken by the urban district council can be allowed, but so much of the £14 16s. 3d. estate duty as is applicable to the purchase-money of the lands taken must be allowed. The principle of the decision of *Ex parte Rorke* (1) applies, and as it was necessary for the Immigrants' Aid Society to take steps to prove their title in order to have the money paid out of Court, they must be allowed all proper costs incident thereto.

Solicitors for the Lurgan Urban District Council: *Moore & Johnston.*

Solicitors for the administrator, Henry Geare: *Lyness & Hayes.*

R. W. L.

M. R.
1902.
Jan. 20.

IN RE FITZGERALD, DECEASED; BRERETON *v.* DAY.

(1894. No. 902.)

Settled land—Tenant for life—Forfeiture clause—Non-residence—Settled Land Act, 1882 (45 & 46 Vict. c. 38) sect. 51.

A testatrix gave to A B the use of her house in Dublin during her life as a residence, with a proviso that in the event of A B ceasing to reside in it it should form part of her residuary estate. She also gave to A B the income of a sum of £10,000 for life, or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence:—

Held, in the event of a sale of the house by A B under the Settled Land Acts, the gift over of the £10,000 was void under the Settled Land Act, 1882, section 51.

SUMMONS.

This was an application on behalf of the plaintiffs, Robert Kean Brereton and Maria O'Grady, that it might be determined by the Court whether in the event of a sale by the plaintiff, Maria

O'Grady, under the powers of a tenant for life conferred by the Settled Land Acts, of the house, 29 Merrion-square, the gift over of the legacies of £5000 and £5000 bequeathed by the will of Julia Lady Fitz Gerald would take effect, or whether the said gift over was void under section 51 of the Settled Land Act, 1882. This was an action to carry out the trusts of the will of Julia Lady Fitz Gerald and to administer her personal estate.

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The testatrix by her will appointed the plaintiffs executor and executrix and trustees, and directed that they should stand possessed of her house and premises in Merrion-square upon trust, to permit the said Maria O'Grady, if she should so desire, to make the said house and premises, with its contents, her residence during her life, and after her death, or in case she should not desire to occupy and use the said house, or should cease to do so, then in either event the said house should form part of her residuary property, which she bequeathed to the defendants, the Bishops of Cashel and Killaloe and the Rev. W. E. Burroughs, subject to the payment of her debts, funeral and testamentary expenses, upon trust, to pay or apply the residue and the proceeds thereof, when realized by sale or otherwise, for the use of the Church of Ireland, in the counties of Limerick and Clare, and she directed that, in the event of the said Maria O'Grady electing to reside in her house in Merrion-square, her trustees were to set apart in trust securities a sum of £5000 and pay the interest thereof to the said Maria O'Grady during her life, or for such shorter period as she might make the said house her principal residence, and that on her death, or ceasing to make the said house her principal residence, the said sum was to fall into her residuary estate.

By a codicil to her will the testatrix gave a further legacy of £5000 to Maria O'Grady on the same terms as the £5000 given by the will.

The testatrix died on May 5th, 1894, and her will was proved by the plaintiffs on August 10th, 1894. The estate of the testatrix was duly administered under the direction of the Court, and by order of July 16th, 1896, a sum of Consols was set apart to represent the two legacies of £5000 each, and the dividends ordered to be paid to Maria O'Grady for life or till further order. Maria O'Grady made the house her principal residence for some time after the

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date of this order, but owing to the state of her health she desired to cease residing in the house, and to sell it in exercise of her powers as tenant for life under the Settled Land Acts. In the event of such sale she was willing to forego any claim to the income of the proceeds of such sale, but without prejudice to her right to continue to receive the income of the funds in Court, representing the said two legacies of £5000 each.

This summons was accordingly issued in the action, and also entitled in the matter of the Settled Land Acts.

H. Cole Bowen, in support of the application :—

The gift over of two legacies in the event of Maria O'Grady ceasing to make the house her principal residence is a provision as to other property tending to prevent the tenant for life from exercising the powers over the settled land given by the Act, and is therefore deemed to be void: Settled Land Act, 1882, sect. 51. In *Re Paget's Settled Estate* (1) it was held that a son might sell the estate under the Settled Land Acts although his interest therein was to cease in the event of non-residence therein. In *Re Thompson* (2) the letting of a mansion-house was authorized although there was a condition of forfeiture on non-residence. In *Re Smith, Grose-Smith v. Bridge* (3), extended the principle of these cases. There it was held that in the case of sale of real estate under the Settled Land Acts a gift over of personal estate was ineffectual.

Garrett Walker, for the defendants, consented to the application.

THE MASTER OF THE ROLLS :—

The question raised by the summons is this: The testatrix left the house, 29 Merrion-square, to Miss O'Grady, who is one of the plaintiffs in the action, for her life, with a direction that she should make it her principal place of residence, and with a gift over if she did not do so. The gift of the house in this way is clearly within section 51 of the Settled Land Act, 1882, and,

(1) 30 Ch. D 161.

(2) 21 L. R. 109.

(3) [1899] 1 Ch 331.

therefore, void for the purposes of that Act. If the gift of the house stood alone Miss O'Grady might have found it desirable not to take advantage of it, but there were two legacies of £5000 each, the interest of which was given to her, one by the will, the other by a codicil, for life, or as long as she made the house, 29 Merrion-square, her principal residence, with a direction that upon her death or ceasing to make the house her principal residence these legacies were to fall into the residue. Thus not only is the condition of residence imposed on Miss O'Grady, but there is a gift over if she fails to perform the condition.

The policy of the Settled Land Act, 1882, was to render lands however settled, absolutely disposable by sale, so that there should not be any land not capable of changing hands. Section 51 of that Act is as follows: "If in a will a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have the operation aforesaid, shall be deemed to be void." This applies to the house itself in this case as it is "settled land"; but the important part of the section for the present purpose is contained in the subsequent words which I have read, which extend the prohibition of an attempt to prevent the tenant for life exercising any power under the Act (*e.g.* the power of sale) to an attempt to do so by a limitation, gift, or disposition of other real or personal property. The only question I have to consider is, does this prohibition apply to a disposition of other, *i.e.* collateral property? It is perfectly clear from the words of the section that it does, even if there was no decision to that effect. The gift to Miss O'Grady of the interest on the two sums of £5000 as long as she makes the house her principal residence is a provision which not only tends to

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prevent, but has the effect of preventing, her selling the house, and, therefore, it is to be deemed void for the purposes of the Act, with the result that she will not lose the interest on the legacies if she sells the house.

The case of *In re Thompson* (1) is a direct authority on the point, and so is the case of *In re Smith, Grose-Smith v. Bridge* (2), which goes further than the present case, as there the provision which tended to prevent a sale of the settled land was contained in an instrument different from that under which the tenancy for life of the settled land was created. The policy of the Act is that the tenant for life is to have full power to sell the settled land, and any condition imposed to prevent his exercising this power is not only inapplicable to the settled land, but is to be deemed void, that is to say is inapplicable to any other property to which the condition is attached.

I must, therefore, answer the question asked by the summons by saying that, in the event of the sale of the house, 29 Merrion-square, the gift over of the legacies of £5000 each is void under the Act and does not take effect.

Solicitor for the plaintiff: *H. F. Martley.*

Solicitors for the defendants: *Sutton & Co.*

W. L.

(1) 21 L. R. Ir. 107.

(2) [1899] 1 Ch. 331.

WREN v. STOKES.

Ross, J.
1900.

Sheriff—Execution—Removal of chattels without regarding landlord's claim for rent—9 Anne, c. 8—Tort—Measure of damages.

Dec. 7, 18.

Appeal.
1901.

Feb. 12.

Where cattle, exceeding in value one year's rent, were seized in execution by a special bailiff, who, after notice of a claim for rent by the landlord, removed them from the lands without paying a year's rent, and subsequently, after five or six days, returned them to the lands, on the amount of the claim being satisfied:—

Held, by the Court of Appeal (affirming Ross, J.), that the landlord was entitled to damages, as in an action of tort, which were measured at the amount of the year's rent, of which he had been deprived.

Garde v. Baylor (unreported) followed.

THIS matter had been put by the Receiver Examiner into the Judge's list. It was an application for an order that the receiver be directed to pay to Leslie K. Wren the amount of one year's rent due by three tenants.

The facts appear fully in the judgment of Ross, J.

Morphy, for the landlord, Leslie K. Wren :—

Under section 1 of 9 Anne, c. 8, the sheriff should have levied sufficient to pay the year's rent and the amount of the decree. The cattle were taken by virtue of the execution. A civil bill decree is within the statute of Anne, and an action of debt lies against the execution creditor : *Ryan v. Daly* (1). Even if the cattle did not belong to the execution debtor, still they were liable, when seized, for the landlord's rent : *Forster v. Cookson* (2). The removal of the cattle constituted the cause of action : *Gill v. Wilson* (3). It is clear that before the cattle were removed the execution creditor had notice of the landlord's claim for rent, and therefore he is now liable to pay the rent of which he has deprived the landlord.

(1) 2 Jones, 299.

(2) 1 Q. B. 419.

(3) 3 Ir. C. L. R. 544.

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F. N. Greer, for the execution creditor :—

The statute of Anne is not intended to apply where the execution creditor is the personal representative of a deceased landlord as here, but where the judgment creditor claims adversely to the landlord : *Taylor v. Lanyon* (1). In that case it was held that the words in the corresponding English statute contemplated an adverse execution, *i.e.* where a *jus tertii* intervened, against which the landlord was meant to be protected.

Further, it is necessary that notice of the landlord's claim for rent should be given : *Waring v. Dewberry* (2). Here the notice was on the 16th May, while the seizure was not until the 19th July. *Ryan v. Daly* (3) has been overruled by *Garde v. Baylor* (4), a decision of the Court of Appeal, which is referred to in *Garde v. Dunlea* (5).

As to the measure of damages, they are so small that they cannot be ascertained. The landlord's right to distrain was only suspended for six days, one of which was a Sunday, when no distress is lawful. As the cattle were restored on the lands there was not a dispossession. There was no sale ; the tenant paid the amount of the decree and costs, and the cattle were restored to the lands where they could satisfy the landlord's right of distress.

[He also cited *Palgrave v. Windham* (6)].

Morphy, in reply :—

See section 9 of the Irish Statute of Frauds. This has been extended as against a purchaser for value. The statute of Anne applies to goods which might not be liable to the landlord's right of distress : see *Dixon and Gilliland on Sheriffs*, p. 61. The proceeds of the sale, so long as they remain in the sheriff's hands, are subject to the landlord's claim for the rent : *Arnitt v. Garnett* (7). The cattle now on the lands may not be the same security for the landlord's rent, as, doubtless, the purchaser at the sale has a lien on them. The receiver was guilty of gross impropriety.

(1) 4 M. & P. 316.

(2) 1 Strange, 97.

(3) 2 Jones, 299.

(4) Unreported.

(5) 15 Ir. L. T. R. 34.

(6) 1 Strange, 212.

(7) 3 B. & Ald. 440.

Ross, J. :—

The point I have to decide is connected with what is usually called sheriff's law. The material facts are briefly as follows:—The late Leslie Wren, who was tenant for life of certain estates, died in 1894. Mr. Harris is a receiver over the rents that accrued in his lifetime. On the death of Leslie Wren, his eldest son, Leslie K. Wren, entered into possession of the rents and profits of the lands. The receiver obtained decrees for rent against some of the tenants. These decrees were lodged with the sheriff of the county for execution. The agents for the present landlord served a notice on the sheriff informing him that a year's rent was due, and requiring payment before removing any of the goods, pursuant to the statute of Anne. The sheriff refused to execute the decrees unless the rent was provided for by the receiver. The rent was not provided for, and the sheriff refused to proceed further. The receiver, with full knowledge of the cause of the sheriff's inaction, got a special bailiff appointed. This bailiff seized cattle of more value than would have satisfied the landlord's rent, removed them from the land, and kept them in pound for five or six days. The cattle were nominally sold to an assistant of the special bailiff. Some friends of the tenants paid the amount of the decrees with costs and expenses, and recovered the cattle, which were brought back to the lands.

For the receiver it is contended that the landlord has received no injury whatever, and that at most he is entitled to nominal damages. For the landlord it is contended that he is entitled now to be paid his year's rent. I have above briefly summarized the facts. I have no doubt that the receiver was aware that notice had been served demanding the year's rent, and I have no doubt there was not a real sale of the cattle. They were redeemed from seizure by the payments I have mentioned. I am of opinion that although the decrees were for rent, the receiver was in the same position as any other execution creditor.

I now proceed to apply the law to the facts above stated. Goods under an execution are in the custody of the law, and cannot be distrained for rent. To remedy this wrong to the landlord the statute of 9 Anne, c. 8, was passed, corresponding to the English Act, 8 Anne, c. 14. It provides that no goods on the

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lands shall be taken unless the party at whose suit the execution issues before the removal of the goods from off the lands pays to the landlord any arrears of rent (not exceeding one year's rent) which may be due. The statute gives no remedy by way of penalty or otherwise. It is merely prohibitory. It forbids the goods, which are the security for the distress from being taken off the lands until the rent is paid. The goods are not "liable to be taken by virtue of the execution" until the year's rent is paid. It is only when this has been done that the party may proceed to execute his judgment or decree. In the case of *Ryan v. Daly* (1) the Irish Court of Exchequer decided that an action of debt under this statute lay by a landlord against the plaintiff in a civil bill decree for removing goods without satisfying the arrears of rent then due. The Court was of opinion that an implied condition was annexed to any levy, namely, that the plaintiff in the execution will pay the rent then due. The result, if this were good law, would be that as soon as the execution creditor removed any goods—no matter how small their value—he would become immediately liable for the entire year's rent if so much were due. It appears, however, [that in an unreported case of *Garde v. Baylor* (referred to in 15 I. L. T. R. p. 35), the Court of Appeal dissented from this view, and held that the action under the statute was not in debt, but in tort, and that the measure of damages was the value of the chattels seized. Although the case has not been reported, I have had the advantage of seeing the order of the Court of Appeal, and the reference to it seems to be correct. The question in the present case is now one of the measure of damages. Mr. Greer ably contended that although the statute had been violated, the landlord had suffered, as a consequence of such wrong, no loss whatever, because the cattle on which he could have levied a distress were returned to the lands. If this argument were sound it would render the statute almost inoperative in this country. The execution creditor could, in many cases, contend that no damage had been suffered because sufficient distrainable goods had been left on the premises after the removal. I do not think that the person who has intentionally infringed the provisions of the

statute can be allowed to set up such a contention. It seems to me that the true principle of measuring the damages the landlord has sustained is to be found by considering what the landlord's position would have been if the provisions of the statute had been complied with. He would have got a year's rent. By reason of the wrongful act he has lost a year's rent to which in the events that happened he was lawfully entitled. He might, it is true, never have distrained, or after the goods were restored he might have successfully distrained; all that is beside the question. In the events that happened, namely, the seizure and removal, he became entitled to receive from the execution creditor a year's rent provided the goods seized were of that value. It is not disputed here that they were of that value; therefore he lost the year's rent by reason of the receiver's wrongful act. I, accordingly, order the receiver to pay the rent as set out in the Form A lodged the 4th September, 1900, to the landlord in the cases of the tenants from whom he has realized the amount of his decrees.

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The execution creditor appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.)

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F. N. Greer, for the appellant.

Morphy, for the respondent, the landlord.

THE COURT, without calling on counsel for the respondent, affirmed the judgment appealed from.

G. Y. D.

M. R.
1900.

FRENCH v. FRENCH.

Feb. 23, 24.
March 7.

Will—Secret trust—Property left by will to legatee absolutely—Secret arrangement that the legatee was to leave this property, along with property of his own, to a nephew of the testator.

Appeal.
June 11, 12.
13, 29.

H. L.
1901.
Dec. 3, 6, 9.

In the year 1899 A, a clergyman, made his will, and thereby, after making two pecuniary bequests, left the residue of his property to his brother B, a solicitor, whom he appointed his executor. In the year 1891, during the lifetime of A, B prepared, in his own handwriting, a draft will, whereby, after leaving the plaintiff, who was his nephew, a property called Owenbeg, he devised and bequeathed all the residue of his property to the defendant, who was the son of a deceased nephew. He sent this draft will to the plaintiff, who also was a solicitor, for his suggestions. Immediately afterwards, and during the lifetime of A, B prepared, in his own handwriting, a draft codicil to his will, in which he recited A's will, by which he was appointed residuary legatee and executor, and also recited the particulars of A's property, and thereby, in the event of his surviving his brother, and becoming entitled to A's property, he devised and bequeathed the same, item by item, to the plaintiff, and he stated that he made these dispositions in pursuance of an arrangement made with his brother A, that the property mentioned in the draft codicil should go, along with Owenbeg, to the plaintiff, and that his own property should go to the defendant, adding that if A survived him, he would make a new will carrying out the provisions of the codicil. A died shortly after the preparation of the draft codicil, and before either it or the draft will were executed, and B thereupon prepared and executed a will practically incorporating the provisions of the draft will and codicil, but not stating anything about the arrangement made with his brother. B sent this will, while in draft, to the mother of the defendant, and at the same time wrote a letter, which he did not send her, stating that he had left the plaintiff Owenbeg, and a full equivalent for the money and property which he had taken on A's death, "it being arranged between us that his property was to go to J," the plaintiff, "and mine to W," the defendant's father. By a subsequent will and codicils B revoked, one by one, the bequests to the plaintiff of each item of the property representing A's estate, and directed the same to fall into his residuary estate, to which the defendant was to become entitled, and by the testamentary dispositions operative at the death of B, who died in 1899, the plaintiff only took Owenbeg. B kept accounts and rentals of A's property from 1891 to 1899, separating them from the accounts his own property. He also wrote out a memorandum stating his reasons for revoking the several bequests of portions

of A's property to the plaintiff, from which it appeared that he revoked these dispositions for the purpose of recouping himself or his estate for some loss which he imagined he had sustained by the conduct of the plaintiff and another solicitor whom he had taken into partnership with him. It was proved by an old friend of B that he had stated to her that A had said to him that he would take care of the plaintiff if he, B, would take care of the defendant:—

Held, by the House of Lords, reversing the decision of the Court of Appeal, (Fitz Gibbon and Walker, L.JJ., from whom Lord Ashbourne, C., dissented), and restoring the decision of the Master of the Rolls, that B took A's property upon trust to leave it and Owenbeg by will to the plaintiff.

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ACTION.

The question in this action was whether Michael King, deceased, was at the time of his death seized and possessed of the property devised and bequeathed to him by the will of John King, deceased, and of the lands and house known as Owenbeg Cottage, Dungiven, subject to his own life interest therein, in trust for the plaintiff.

The Rev. John King, late of Fahan Rectory, in the county of Donegal, by his last will, dated July 24th, 1889, after leaving to Canon Dougherty a legacy of £200 (which lapsed), and to Mary Johnson a legacy of £300, devised and bequeathed all the residue of his real and personal estate to his brother, Michael King, whom he appointed his executor.

John King died on June 13th, 1891, a bachelor, and Michael King obtained probate of his will on July 30th, 1891.

At his death John King was seized and possessed of three houses in the main street of Limavady, part of the glebe lands of Fahan, in the county of Donegal, and of personal estate valued, after payment of debts, funeral and testamentary expenses, and the said legacy of £300, at £2880 15s. 11d., as appeared by the residuary account passed by Michael King, dated August 28th, 1891. In passing the Inland Revenue accounts Michael King treated himself as beneficially entitled.

John King and Michael King had two nephews, the late William Michael French, and the plaintiff, only sons of a sister of John King and Michael King, who predeceased them. They had no other brothers or sisters, and no nieces. William Michael French was the husband of the defendant, Frances Browning French, and father of the defendant, Michael King French.

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Michael King was married in 1850. His wife died in September 1890. Their only child, a daughter, had predeceased her without having attained age or married. Michael King and the plaintiff were solicitors, the former practising in Limavady, and the latter in Dublin. Michael King took the plaintiff and Mr. Ingram into partnership with him as from 1st July, 1891, the firm being "Martin, King, French, and Ingram."

In the year 1891, prior to the death of John King, Michael King prepared a draft will, dated 31st March, 1891, and codicil, dated 2nd May, 1891, each in his own handwriting, and each respectively endorsed on the back thereof, "draft will of Michael King," and "draft codicil to the will of Michael King." In this draft will Michael King purported to devise to the plaintiff Owenbeg Cottage, Dungiven, which had been his (Michael King's) father's residence, and had become his property; and in the draft codicil, after reciting the will of John King above mentioned, and reciting the particulars of the property of which John King was then seized and possessed, Michael King wrote as follows:—

Now in the event of my surviving my brother and of my becoming entitled thereto as his devisee and legatee, I devise and bequeath the three houses in the main street of Limavady, the part of the Glebe of Fahan so purchased by my brother, the sums of £800 and £100, making together £900, being the half of the mortgages of Bernard Sweeny and Thomas Smith, and the sum of £1000, secured on the property of Colonel Lyle, to my nephew, John Alexander French, absolutely. And I make this codicil, in pursuance of an arrangement with my brother, that the property and money, the subject of this codicil, should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King. Should my brother survive me, he will make a new will carrying out the provisions of this codicil. In witness, etc.

On the 30th March, 1891, the said Michael King wrote a letter to the plaintiff enclosing the said last mentioned draft will for his (the plaintiff's) perusal and advice, and asking him to let the defendant, Frances Browning French, at the same time see it. Upon receipt of the said draft will the plaintiff, on the 4th and 7th April following, respectively, wrote both to the defendant, Frances Browning French, and to his said uncle, Michael King, expressing dissatisfaction with the terms thereof on account of his brother

William's children receiving more benefits thereunder than he did. In reply to the plaintiff's said letter of the 7th April, on the 12th April Michael King wrote to him as follows:—

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I have received your letter. You need not imagine that you have been forgotten. I think my residence and property should go to my eldest uncle [he meant nephew] for life. As he is not, to his son who bears my name. If I carry out my present intention you will get at my death property worth at least £3000, and £2000 at least of money, and you will have under the will my father's house—a nicer house than this—and I hope you will reside there. I hope to make an arrangement about the business after July, when my accounts will be made up—business matters divided from private. On consideration, full consideration, I came to the conclusion that I should not pass over William's family for his younger brother. I would like to satisfy all; but this, of course, is a thing never done.

Amongst Michael King's papers was also found the following written memorandum:—

Wrote him that if my present intention is carried out he will get at my death property about £3000 and £2000 at least of money, and this in addition to my father's residence.

Michael King did not send the draft codicil to the plaintiff, and the plaintiff did not know of it until after his uncle's death. The draft will and codicil were subsequently bound up together as one document, and endorsed by Michael King with a direction that a copy was to be made of the same, and were found in this state after Michael King's death.

After the death of John King, Michael King altered the old draft into a new draft will (endorsed 1. 7. 1891), in which, as he stated in a note made by him in the margin of the said draft codicil, were embodied the provisions of the said draft codicil, and he sent the same by post, accompanied by a letter to the defendant, Frances Browning French, on July 15th, 1891. On the same day he wrote a draft or copy of a letter to the said defendant in which he stated:—

I have left John French my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to Johnny and mine to William.

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The defendant, Frances Browning French, however, stated in her evidence at the trial that she never received any letter to this effect, or relating to any arrangement between Michael King and John King. The draft will was sent to the defendant for the purpose of getting it settled by counsel, and after the same had been so settled, Michael King, on October 19th, 1891, duly executed a will embodying the provisions of the draft, and practically carrying out the terms of the arrangement made between him and John King, and mentioned in the draft codicil and draft or copy of the letter dated July 15th, 1891. By this will Michael King left Owenbeg Cottage and the furniture therein, and the houses and lands formerly the property of John King, to the plaintiff, and also left him a legacy of £2500, to bear interest at 4 per cent., but not to be called in during the life of Frances Browning French.

After the death of John King, Michael King moved the furniture of his deceased brother from Fahan to the said Owenbeg Cottage, where it remained until his death. He also gave to the plaintiff plate belonging to John King.

Michael King was in the habit of having accounts made out to 1st July in each year. The accounts contained particulars of his business matters with clients, and also of private moneys and affairs. In these accounts, after John King's death, his estate was, along with Owenbeg Cottage, kept distinct from the other properties belonging to Michael King, and the accounts relating to John King's estate and Owenbeg Cottage were entitled, "Rev. John King's property."

By a codicil, dated December 2, 1893, Michael King revoked the legacy of £2500 given to the plaintiff by the will of October 19, 1891, and directed the same to fall into his residuary estate. Michael King subsequently on March 16, 1894, executed a new will revoking all previous wills and codicils, and thereby devised and bequeathed to the plaintiff the said house and lands of Owenbeg Cottage, the furniture therein, the said lands of Fahan, and the said houses in Limavady, devising and bequeathing all his residuary estate upon certain trusts under which the defendant, Michael King French, was to become entitled thereto upon his attaining the age of twenty-one years. On November 26, 1894,

Michael King made a codicil to this last-mentioned will, and thereby revoked the devise to the plaintiff of the lands of Fahan, and directed that the same should be treated as residue. On December 12, 1896, Michael King made a second codicil to his said last-mentioned will, and thereby revoked the devise to the plaintiff of the houses in Limavady, and directed that the same should be treated as residue. There were found amongst his papers, after his death, drafts of the said two codicils altered by the testator in his own handwriting, and also a document entitled "memorandum of cancel of former will and codicil," and prepared in the handwriting of a clerk, but altered by Michael King in his own hand, and signed by him. The last-mentioned "memorandum" bore two dates, December, 1893, and March 16, 1894. It was added to and altered from time to time by Michael King, and purported to give his reasons for revoking the devises and bequests previously made in favour of the plaintiff. The document alleged that "at the time of entering into the partnership it was arranged that the business should be carried on by the partners as theretofore," and that "the business debts due to"—this word was originally written "by," but was corrected in Michael King's handwriting—"Michael King should be taken over by the firm," and it states "that this arrangement" had not been carried out. At the trial the plaintiff stated that there was no ground for this allegation, and it was admitted that all the business debts due by and to Michael King at the commencement of the partnership were specified by him in a balance-sheet dated 1st September, 1891, that all these business debts were taken over by the firm; and the first payment made by the firm was the sum of £1598 16s. 10d., which was paid by a cheque to Michael King in discharge of the amount shown by the said balance-sheet as due to Michael King. He made no complaint of any grievance such as that alleged in this "memorandum" in his lifetime, and there was, in fact, no foundation for the statement that either Mr. Ingram or the plaintiff did not do everything which they agreed to do respecting the partnership and the acquisition by the firm of the business of Michael King. Having stated the alleged loss, the "memorandum" proceeds:—"I have no way of recouping myself except by charging the loss against the benefits to be derived by

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Mr. French," (these last two words were altered by the testator into "the firm,") "one of the partners under my will, and which the codicil executed to-day, depriving him of a cash legacy of £2500, will to some extent remedy." And further on he says:—"I am willing to accept the cancelled legacy in full of all my demands, and my partners can easily arrange between themselves the payment of this money after my death. Dated December, 1893; 16th March, 1894.—MICHAEL KING. The sum of £2500 and the lands of Fahan being insufficient for this purpose, I am reluctantly obliged to revoke the sum or gift given by said will of the lands of Fahan of my three houses in Limavady devised to Mr. French by the said will, the devise of lands of Fahan being revoked by a previous codicil."

There was also found among the papers of the deceased a document which stated that his reason for revoking the devise of the houses in Limavady, and directing same to fall into the residue, was the reduction of the rents of his other lands under the Land Acts.

Michael King died on April 17, 1899, without having altered or revoked his said last-mentioned will, save by the said two codicils, and without having altered or revoked the said codicils, and probate of the said will and codicils was, on June 21, 1899, granted forth of the Principal Registry of the Queen's Bench Division (Probate) of the High Court of Justice in Ireland to the defendant, Frances Browning French. Frances Browning French employed the plaintiff to take out probate for her, and he continued to act for her until he put forward the claim made in this action.

The several documents hereinbefore referred to were discovered among the papers of Michael King in taking the steps necessary for obtaining probate of the said will and codicils, and on their discovery the plaintiff claimed that the arrangement referred to in the first above-mentioned draft codicil and the document dated July 15, 1891, constituted a secret trust in his favour, and that he was thereby entitled, from Michael King's death, to Owenbeg Cottage and the property which John King devised and bequeathed to Michael King.

The writ of summons in the action claimed:—

(1) That it might be declared that at the time of his death the

late Michael King, of Strangemore, Londonderry, was seized and possessed of the property devised and bequeathed to him by the will of John King, deceased, dated July 24, 1889, and of the house and lands known as Owenbeg Cottage, situate at Dungiven, in the county Londonderry, subject to his own life interest therein, in trust for the plaintiff, his heirs, executors, and administrators absolutely.

(2) In and so far as might be necessary that the real and personal estate of the said Michael King might be administered by the Court.

The plaintiff averred in his statement of claim that it was arranged and agreed by and between the said John King and the said Michael King that the property so left by the said John King, together with Owenbeg Cottage, should on the death of the said Michael King go to the plaintiff; and that the said Michael King accepted the property devised and bequeathed to him by the said John King, and the same was devised and bequeathed to him by the said John King on the terms and on the condition that on his death he would leave the said property left to him by John King and Owenbeg Cottage to the plaintiff. The plaintiff accordingly submitted that the said Michael King had no power to dispose of the property by him derived from the said John King, except in accordance with this arrangement; and the plaintiff, therefore, claimed in addition to Owenbeg Cottage and the furniture therein, devised and bequeathed to him by the will of Michael King, all the real estate of the late John King, with the rents and profits from April 17, 1899, and also all the residuary personal estate of the said John King other than the said furniture, with interest from April 17, 1899. The plaintiff stated that he was willing to accept the sum of £2880 15s. 11d., less by £86 3s. 2d. legacy duty paid thereon, as being the net assets of the said John King, as returned in the residuary account passed by Michael King, and retained by him in full discharge of all claims against the said Michael King's estate in respect of John King's personal estate. However, if the accuracy of the said residuary account was not admitted, or if it became necessary for the purposes of the action, the plaintiff submitted that the real and personal estate of John King should be administered in the action.

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The defendant, Frances Browning French, by her defence, thereby denied that it was arranged and agreed between the said John King and Michael King, as alleged in the statement of claim, or that Michael King accepted the property devised and bequeathed to him by John King, and that the same was devised and bequeathed to him, as aforesaid, upon the terms and conditions therein alleged. On the contrary, the defence averred that Michael King always regarded and dealt with the said property as belonging to him absolutely.

The defendant, Frances Browning French, further submitted—
(a) that the alleged agreement relating to Owenbeg Cottage was not enforceable by the plaintiff, and she relied on the provisions of the Statute of Frauds; (b) that if the plaintiff succeeded in establishing the secret trust for which he contended, and thereby obtained any property, he must relinquish all benefit which he derived under the will of Michael King.

The defendant, Michael King French, an infant, by Thomas Hone, his guardian *ad litem*, delivered a formal defence pleading his infancy, and submitting his rights and interests in the matters in question to the protection of the Court.

At the trial the plaintiff was sworn, and stated that he had never heard anything about the secret trust from Michael King; that the first intimation he got of it was from Miss Eleanor Macartney, who had told him of it after Michael King's death, and before he had read the documents now produced, which he had discovered among Michael King's papers. Immediately on learning the contents of these documents he told the defendant that he believed they evidenced a secret trust in his favour.

Miss Eleanor Macartney deposed:—"I was a very intimate friend of the late Michael King and of his wife and all the family. I was in the habit of paying visits until recently at Strangemore. I remember being there. I am not sure of its being 1891. It may have been 1892. I remember sitting with him in the drawingroom. He had something in his hand. He was reading his will. I did not know it. He asked me did I know what he was reading. I said, 'How can I tell?' He said it was his will, that he did not approve of splitting up properties, that he would leave his heir his personal

property. He said to me, 'Tell me what you think?' I said, 'How can I?' He then spoke of other property that belonged to John, and said that property was to go to John French, and that he would have it for his lifetime. He said it was a good deal of property. He said there was a good deal at Fahan, where he used to reside, and also at Limavady. He spoke of one or two arrangements which he had made. He referred to the conversation he had had with his brother John. He said that Mr. John King had said he would take care of John" (*i.e.* the plaintiff) "if Mr. Michael King would take care of William" (*i.e.* the plaintiff's brother). "He told me that that was what Mr. John King had said to him. He said that he quite agreed that this property was to be John French's. He said that that was what he intended to do. That was his meaning."

Did he tell you that he had told his brother John that he agreed to that agreement? "He said he was certain that he agreed. They were quite agreed. He said there was a good deal of property; and then he suggested that he should leave a little over to his housekeeper; so instead of £100 he left her £300. I said, 'You are spoiling them.' He said, 'I have finished.' He particularly said that John French was to have Mr. John King's property."

In cross-examination the witness stated:—"I knew Michael King for a very long time. He was a most trustworthy, benevolent, kind gentleman. I never heard anyone suggest that he was otherwise, nor could not believe it. I think this conversation took place in 1893 or 1894. It was the end of August or beginning of September. The Rev. John King was dead at the time of this conversation."

The defendant, Mrs. F. B. French, was examined and deposed:—"I had not any communication with Michael King until I got this letter of 3rd January, 1891. That was the first communication I got from him with reference to his will. The next was when Mr. French wrote to me sending me the draft will, 4th April, 1891. Then I wrote the letter to Mr. King of 6th April. I did not receive any other letter from Mr. Michael King about that time. I got the letter sending me the will. I never heard of this so-called arrangement until the day fortnight after

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FRENCH never received that letter. I have no recollection of receiving
v. any letter in any way like that. I did not receive any letter
FRENCH. relating to any arrangement between Michael and John King. I went down to Strangemore after Michael King's death, a day or two days I think after. The plaintiff went down with me. I was executrix of the will of Michael. Mr. French was my solicitor. Mr. French said he wanted to go into Mr. King's office to find some papers which it would be necessary for him to have. He did so, and brought them to Dublin next morning. The first day I heard of this arrangement was when I got the letter from Mr. French. It was exactly the day fortnight after his death. I had seen Mr. French several times in the interval. I then went to Mr. French's office, and for the first time saw these two documents." [The draft codicil of 2nd May, 1891, and the document dated 15th July, 1891]. In cross-examination the defendant was handed her own letter of 17th July, 1891, commencing, "I received your letter of to-day and draft of will." She said, "I have no recollection of the contents of that letter. I think I would have remembered it if it were that. He had discussed very fully with me about the thing. I think he simply said, 'I send you the will now. You can bring it to Mr. Hart.'"

The defendants also put in evidence a draft will of John King, dated 25th July, 1883, and two wills of John King, dated respectively 9th August, 1883, and 11th February, 1886, the contents of which were practically (except for the legacy to Canon Dougherty) identical with the contents of the will of 24th July, 1889. The defendants also produced a will made by Michael King on 31st August, 1888, in which he devised and bequeathed all his residuary estate to his wife upon trust for herself for life, and after her death for such person as she should appoint, and in default of appointment for John King, and he appointed his wife his executrix. There was also put in evidence the correspondence between John King and Michael King relating to the wills of John King and the disposition of his books after his death. The contents of this correspondence are stated in the judgment of Lord Justice Walker.

Ronan, Q.C., and *Matheson*, Q.C. (with them *Dixon*), for the plaintiff.

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Henry, Q.C., and *Jellett*, Q.C. (with them *Chaytor*), for the defendants.

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[The following cases were cited:—*M'Cormick v. Grogan* (1) ; *Jones v. Bradley* (2) ; *Stickland v. Aldridge* (3) ; *Scott v. Brownrigg* (4) ; *Riordan v. Banon* (5) ; *Chester v. Urwick* (6) ; *Barrow v. Greenough* (7).]

THE MASTER OF THE ROLLS:—

March 6.

The statement of claim alleges as follows:—The Rev. John King, late of Fahan Rectory, in the county of Donegal, duly made his last will, dated the 24th day of July, 1899, and thereby, after leaving to Canon Dougherty a legacy of £200, which lapsed, and to Mary Johnson a legacy of £300, devised and bequeathed all the residue of his real and personal estate to his brother, Michael King, whom he appointed his executor.

John King died on the 13th day of June, 1891, a bachelor, and probate of his said will was, on the 30th day of July, 1891, granted to Michael King.

John King died possessed of three houses in the main street of Limavady, part of the glebe lands of Fahan, in the county of Donegal, containing 45 acres 2 roods and 32 perches, and of personal estate valued, after payment of debts funeral and testamentary expenses and the said legacy of £300, at £2880 15s. 11d., as appears by the residuary account passed by the said Michael King, dated August 28th, 1891.

The plaintiff is a nephew of John King and Michael King, and the late William Michael French, the husband of the defendant, Frances Browning French, and the father of the defendant, Michael King French, was another nephew of theirs. They had no nieces and no other nephews.

Then follows a statement of fact upon which the case depends.

(1) L. R. 4 H. L. 82.

(5) I. R. 10 Eq. 469.

(2) L. R. 3 Ch. 362.

(6) 23 Beav. 407.

(3) 9 Ves. 516.

(7) 3 Ves. 151.

(4) 9 L. R. Ir. 246.

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Of course it is not admitted by the defendants. The plaintiff's allegation is as follows:—It was arranged and agreed by and between the said John King and the said Michael King that the property so left by the said John King, together with the house and lands known as Owenbeg Cottage, Dungiven, which had been their father's residence, and had become the property of the said Michael King, should on the death of the said Michael King go to the plaintiff; and the said Michael King accepted the property devised and bequeathed to him by the said John King, and the same was devised and bequeathed to him by the said John King on the terms and on the condition that on his death he would leave the property left to him by John King and the house and lands of Owenbeg Cottage to the plaintiff.

This is the equity on which the action is founded.

In the year 1891, prior to the death of John King, Michael King, who was a solicitor, prepared a draft will and codicil in his own handwriting, and each respectively by him endorsed on the back thereof, "draft will of Michael King," and "draft codicil to the will of Michael King." In the draft will he purported to devise Owenbeg Cottage to the plaintiff, and in the draft codicil he purported to devise and bequeath the property which he expected to get on the said John King's death to the plaintiff, stating that he did so in pursuance of the arrangement.

After the death of John King, Michael King prepared a new draft will, and he sent it to the defendant, Frances Browning French, with a letter dated the 15th day of July, 1891, in which he stated:—"I have left John French," meaning the plaintiff, "my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to Johnny and mine to William."

A draft of this letter was produced, but it was said that it had not been received by the defendant, Frances Browning French.

The draft will was sent to her for the purpose of getting it settled by counsel, and after the draft had been so settled, Michael King, on the 19th October, 1891, duly executed a will embodying the provisions of the draft, and practically carrying out the terms of the arrangement made between him and John King. By this

will Michael King left Owenbeg Cottage and the furniture therein, and the houses and lands formerly the property of John King, to the plaintiff, and also left him a legacy of £2500, presumably as an equivalent for the personal estate of the said John King.

After the death of John King, Michael King removed the furniture of his deceased brother from Fahan to Owenbeg Cottage. He also gave to the plaintiff plate belonging to John King.

By a codicil, dated the 2nd day of December, 1893, Michael King revoked the legacy of £2500, and directed the same to fall into his residuary estate.

He seems to have been dissatisfied with the plaintiff, John French, as to two matters. One was that John French had expressed dissatisfaction with his supposed testamentary disposition, and he resented that. The second matter was as to their partnership. He had taken John French and a Mr. Ingram into partnership on certain terms, and he seems to have imagined that they were not carried out, and he was accordingly dissatisfied. The plaintiff was anxious to go into this, but it was irrelevant, and I would not hear it. Whether Michael King was justified or not would make no difference, and I express no opinion on the question one way or the other.

Michael King subsequently, on the 16th of March, 1894, executed a new will, and thereby devised and bequeathed to the plaintiff the house and lands of Owenbeg Cottage, the furniture therein, the lands of Fahan, and the houses in Limavady; devising and bequeathing all his residuary estate upon certain trusts under which the defendant, Michael King French, would become entitled thereto upon his attaining the age of twenty-one years.

Michael King made a codicil dated 26th day of November, 1894, and thereby revoked the devise to the plaintiff of the lands of Fahan, and directed that the same should be treated as residue.

He also made a second codicil dated the 12th day of December, 1896, and thereby revoked the devise to the plaintiff of the houses in Limavady, and directed that the same should be treated as residue.

The result is that in 1899 nothing was to pass to the plaintiff on the face of the will except Owenbeg.

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Michael King died without issue on the 17th day of April, 1899, without having altered or revoked his said will save by the said codicils, and without having altered or revoked the codicils, and probate of the said will and codicils was on the 21st day of June, 1899, granted to the defendant, Frances Browning French.

The plaintiff contended that Michael King had no power to dispose of the property derived by him from John King except in accordance with the arrangement above mentioned, and claims, in addition to Owenbeg Cottage, and the furniture therein devised and bequeathed to him by the will of Michael King, all the real estate of the late John King, with the rents and profits from the 17th day of April, 1899, and also the residuary personal estate of John King other than the furniture, with interest from the said 17th day of April, 1899. The plaintiff agreed to accept the sum of £2880 15s. 11d., less by £86 3s. 2d. legacy duty paid thereon, as being the net assets of the said John King, and returned in the residuary account passed by Michael King, and retained by him in full discharge of all claims against the personal estate. However, if the defendants do not admit the accuracy of the said residuary account, or if it becomes necessary for the purposes of this action, the plaintiff submitted that the real and personal estate of the said John King should be administered in this action.

The prayer of the statement of claim is as follows:—

1. That it may be declared that at the time of his death the said Michael King was seized and possessed of the property devised and bequeathed to him by the will of the said John King, and of the lands and house known as Owenbeg Cottage, subject to his own life interest therein, in trust for the plaintiff, his heirs, executors, and administrators absolutely.

2. That in the events that have happened the plaintiff is entitled to the said house and lands of Owenbeg, and to the said lands of Fahan, and to the houses in the main street of Limavady, and to the rents and profits thereof from the 17th day of April, 1899, together with all the personal estate of the said John King, including the said furniture in the house at Owenbeg, together with interest thereon from the 17th day of April, 1899.

3. That if and so far as may be necessary the real and personal estate of the said Michael King may be administered by this honourable Court.

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4. That if and so far as may be necessary the real and personal estate of the said John King may be administered by this honourable Court.

5. That for the purposes aforesaid all necessary directions may be given, accounts taken, and inquiries held.

6. That his costs of this action may be paid out of the estate of the said Michael King.

Nothing arises on the statement of defence in addition to traverses except the suggestion that a question of election arises as to Owenbeg.

The plaintiff's case turns on the doctrine of secret trust, as to which there is a long line of very familiar authorities. I do not intend to go through the cases.

The rule is stated by Lord Hatherley in *M'Cormick v. Grogan* (1): "So, again, if a legatee states to the testator that upon the testator confiding his property, apparently disposing of it, to him, the legatee, by a regular and formal instrument, he will carry into effect all such intentions as the testator shall confide to him, then that legatee, though he apparently may be held in law to take the whole interest, shall have fastened upon his conscience the trust of carrying into full effect those instructions which he received upon such representations as I have described."

And by Lord Cairns in *Jones v. Badley* (2): "When a person knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a case of trust."

Now what are the facts? I have before me the draft will and codicil of Michael King, all found together and in his own handwriting. The codicil was made in prospect of his surviving his brother John, who was then alive. He recites that his brother by his will, dated 24th July, 1889, devised and bequeathed to

(1) L. R. 4 H. L. 88.

(2) L. R. 3 Ch. App. 363.

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him all his real and personal estate subject to payment of certain legacies, including three houses in the main street of Limavady, to which he became entitled under his father's will, part of the glebe lands of Fahan, purchased from the Church Commissioners, £800 and £100, being one half of the amount of two mortgages on the properties of Bernard Sweeny and Thomas Smith, to which he became entitled on his father's death, and £1000, part of a sum of £1600 secured by mortgage on the estates of Colonel Lyle, and then proceeds as follows: "Now in the event of my surviving my brother, and of my becoming entitled thereto as his devisee and legatee, I devise and bequeath the three houses in the main street, Limavady, the part of the glebe of Fahan so purchased by my brother, the sums of £800 and £100, making together £900, being the half of the mortgages of Bernard Sweeny and Thomas Smith, and the sum of £1,000 secured on the property of Colonel Lyle, to my nephew, John Alexander French, absolutely." Then comes the important part: "And I make this codicil in pursuance of an arrangement with my brother, that the property and money the subject of this codicil should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King (*i.e.* Michael King French). Should my brother survive me, he will make a new will carrying out the provisions of this codicil."

This codicil was prepared in the lifetime of John King. When John King died, his will came into operation, and the whole property passed to Michael King accordingly. A new draft will was then prepared by Michael King, which substantially carried out the dispositions made by the former draft will, but it does not state the reasons.

After the death of John King, Michael King sent the draft of this will to the defendant, Mrs. French, for whom he entertained feelings of affection, with a request to send it to counsel, and it was sent to counsel. It was sent to her in a letter no doubt; but there is no evidence that a letter containing the statements comprised in this paper before me, which appear to be the draft of a letter, was actually received by Mrs. French. She says that she did not get any such letter, and

that she would have remembered it if she had, and I of course accept her statement. The importance of this document is not that it was communicated to anyone. Its importance lies in its contents. It is dated, "Strangemore, Londonderry, 15th July, 1891," and runs thus:—"My dear Fanny,—The death of my brother and other matters delayed the enclosed. You said you would show it to Mr. George Hart. I wish you would do so. My only object is to have it so framed as to save those who succeed me from trouble and litigation. I have left John French my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to John and mine to William. I have struck out his name as trustee, and in consequence taken away from him the Government annuity payable out of the holding of my father which he gets. This £54 8s. 10d. was given him by the first draft, and was to be paid by you, and was intended to be remuneration for his services as trustee, now dispensed with."

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These are the two documents on which the plaintiff's case depends. The letter if not sent, was at any rate prepared for the purpose of being sent, and both it and the preceding statement to the same effect in the draft codicil are to be taken as a declaration by Michael King explanatory of his reasons for making the testamentary dispositions he did make.

The first question is, are we to believe that these statements are true? The common case is that Michael King was a man of honourable standing and character. Nothing was more natural than that these two brothers, two childless old men, should come to a private understanding as to the disposition of their property and the mode in which their nephews were to be provided for. It is not left to slippery memory. No doubt we have also the statement of a lady who was called as a witness, which though in itself falling short of establishing a trust, yet so far as it goes is confirmatory of the written documents. The point is that it is referred to in both documents as an "arrangement," in the one "with my brother," and in the other "between us." Therefore there was mutuality in it. These documents were prepared with reference to the very matter. They cannot have been written in

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jest or with intent to deceive. They are entitled to the same weight as if this suit had been instituted against Michael King in his lifetime, and he had sworn in the same words as he used in these documents. There is no higher form of evidence known to the law than admissions. Mr. Ronan was entitled to say, as he did, that this secret trust is established by evidence unparalleled in the cases. It is said that the documents are open to criticism. Why should the arrangement be secret? That is no answer to the plaintiff's case, even if it is impossible to say why it was a secret arrangement. If it is suggested that it was not to be binding on him, there is no evidence of that. In most cases of secret trust the reason is that the object is one which the law will not allow to be carried out, *e.g.* gifts in favour of charities which are void under the Statute of Mortmain. But there are many cases where the question of illegality does not arise, for example in *M'Cormick v. Grogan* (1), to which I have already referred. Even if no explanation can be given, the trust, if it be established, must be carried out. The motive of John and Michael King may have been that, as one of the persons to profit by the arrangement was a grand-nephew, who was an infant, it might not be desirable that he should be brought up with the prospect of a small fortune waiting for him. Another suggestion was that it was desired to keep up Michael King's position as an owner of property in the county. It does not matter what the object of the arrangement was, if the intention and arrangement were that Michael should take the property for his life only. Another reason suggested why the arrangement should not be binding was that there was a trust as to the books and manuscripts. This is contained in John King's letters to Michael King. He wished his manuscripts to be burned, though he thought it better not to say so in his will. His books he directed not to be sold except in Dublin or Belfast. There is no doubt that he wished this to be done, and that Michael King undertook in writing to carry out his directions as to it. I do not inquire as to his motive. He did not wish that his books and manuscripts should be distributed in his parish. Possibly they might have

disclosed the sources of his pulpit eloquence. But there is nothing in this trust to conflict with or modify the trust as to the lands, which was of a different character.

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The strongest point relied on was that this head of equity dealing with secret trusts is founded on personal fraud. So says Lord Westbury in *M'Cormick v. Grogan* (1) at page 97. No doubt it is, for if a man obtains property by holding out that he will dispose of it in a certain way, and does not do so, of course that is fraudulent. Michael King was, doubtless, a man of high character. He may not have been very familiar with the doctrine of secret trust. Many country solicitors, particularly those of the old school, might not be very well acquainted with this recondite head of equity. He may have misconceived the obligation which flowed from that doctrine. He may have thought that his brother would have changed his mind, and that what he himself was disposed to do would have pleased his brother also in the altered circumstances. Though fraud is at the bottom of the doctrine, it does not follow that there was any high degree of moral turpitude involved in this case. In any event I have nothing to say to that. The contents in his own handwriting prove the trust.

There remains, however, the question whether or not the plaintiff is, under the circumstances, put to his election in respect of the devise to him of the lands of Owenbeg.

In claiming under a trust not disclosed which is at variance with some of the provisions of the will of 16th March, 1894, and the codicils of 26th November, 1894, and 12th December, 1896, the plaintiff is undoubtedly claiming against the will. His case is that he is equitably entitled to the residuary estate of John King, as well as the lands of Fahan, and the houses in Limavady, and that Michael King in purporting to dispose of them was dealing with his (the plaintiff's) property. But the lands of Owenbeg were the testator's own, and he devised them to the plaintiff in the same instrument. This at first looks like the very simplest and most ordinary case for putting the plaintiff to his election.

The doctrine of election is thus stated in Jarman on Wills, (1893

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edition, p. 415): "That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

But it seems to me that the question in the present case cannot be treated so simply. It is true that the will leaves Owenbeg to the plaintiff, and that Owenbeg belonged to the testator in one sense. But if the arrangement or agreement between John and Michael King included Owenbeg, and if (as is plain) Michael King under that arrangement or agreement took a benefit under the will which he would not otherwise have had, then it is not so clear that Owenbeg was his property to dispose of within the meaning of the rule, which requires that the gift shall be of "free and disposable" property.

What is the fact as to Owenbeg? Take the draft codicil:—
"And I make this codicil in pursuance of an arrangement with my brother that the property and money the subject of this codicil should go to his namesake, John French, along with my father's residence."

Of course John King had no power to compel his brother to leave Owenbeg to the plaintiff. But if the brother (Michael) had said that he would not do so, it was open to John to leave him nothing, and to give the plaintiff an immediate estate in all he had. But the brother says that the arrangement embraced all, including Owenbeg. I suppose the two brothers went into it, and arrived at a conclusion as to what they considered fair. It is true that the draft letter to Mrs. French of 15th July, 1891, is ambiguously and incorrectly expressed:—"I have left John French my father's farm and residence and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged

between us that his property was to go to John and mine to William."

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But still the intention to leave Owenbeg to the plaintiff is brought into the arrangement; otherwise the statement that "his property was to go to John and mine to William" would be contradictory, since Owenbeg was Michael's, and yet was to go to John. I am convinced that the arrangement included Owenbeg.

What effect then has this on the question of election?

In the first place, Michael King, who took at any rate a life estate in all his brother's property, could not honestly and honourably repudiate the arrangement under which he took it. It is not needful to decide whether the arrangement was one under which specific performance of the terms as to Owenbeg would have been enforced. I do not intimate any opinion that it would not. I only hold that it is not material whether or not there is a contract which would be specifically performed. There was at any rate an arrangement involving on the part of Michael King that he should leave John King's property to John French, and also his own property of Owenbeg, and under which he enjoyed his life estate in all that was John's. How, then, is the plaintiff to be called upon to elect? The will gives him Owenbeg, and so far the arrangement was carried out; but it does not give him the property which was his by virtue of the undisclosed trusts, and which was all included in the same arrangement. It is impossible to hold that he is put to his election. The case is this:—The will in part carries out the obligation, but not altogether. How, then, can the person who shows that this is so be called upon to elect between taking part of what is his as given by the will and the rest of what is his as proved by evidence of the trust? He may prove the arrangement in part or in whole; but, so far as he proves it, it is all one trust, and he cannot be compelled to elect. Owenbeg, in short, was not "free disposable" property of the testator, for he had bound himself in conscience, and for very valuable consideration, to leave it to John French, as he did.

The case is new in this respect, that a secret trust in cases of this sort is usually confined to property of the testator himself. Here it involves property of the legatee and devisee. I can find

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no similar case in the books. Certainly *Stickland v. Aldridge* (1) is not such a case; for though there was a secret trust to pay £12,000, whilst the property devised was a landed estate, this is treated most distinctly by the Court as a trust attaching on the lands devised, and not as a collateral agreement or condition. Probably the value of the estate rendered it unnecessary to draw the distinction.

Nor am I at present aware of any case in which a question of election has been held to be raised by a secret trust. But this is no more than a detail. I have no doubt that a claim, adverse to a will, founded on allegation of secret trust, may in a proper case raise an election. For instance, if in the present case the arrangement between the brothers had not included a dealing with Owenbeg, I should have had no hesitation in holding that the plaintiff must elect. But the facts are adverse to this view, and, in my opinion, plaintiff can insist on the whole trust, that which is proved by the coercive evidence of the draft codicil and letter, and that which is in fact carried out by the devise of Owenbeg, all founded on the same arrangement. It would be curious if a trustee under a secret trust could get rid of one-half of his liability by performing the other half.

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The defendant, Frances Browning French, appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon and Walker, L.JJ.).

Henry, Q.C., and *Jellett, Q.C.* (with them *Chaytor*), for the appellants.

Ronan, Q.C., and *Matheson, Q.C.* (with them *Dixon*), for the respondent.

The arguments appear sufficiently from the judgments of the Court.

Cur. adv. vult.

LORD ASHBOURNE, C. :—

This is an appeal from an order of the Master of the Rolls, who found that the plaintiff was, under the circumstances appearing in the case, entitled to the benefit of a secret trust admitted and accepted by his uncle, Michael King.

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June 29.

There is but little dispute as to the facts of the case, although there is a grave controversy as to their true meaning, and as to the legal inferences to be deduced from them. They are set forth fully in the judgment of the Master of the Rolls, and I shall only state them, so far as may be necessary, to make my meaning clear.

The Rev. John King was an old unmarried clergyman, who lived at Fahan Rectory, in the county of Donegal. He had an only brother, Michael King, who was a solicitor and land agent, childless, but with a wife, who lived until the year 1890. Their nearest relatives were the children of a sister, namely, William Michael French and the plaintiff, John A. French. William Michael French predeceased his uncle, leaving, however, a widow, who is a defendant, and several children, one of whom, Michael King French, is also a defendant.

The Rev. John King, by his will, left all his property, save two small legacies, to his brother, Michael King, whom he appointed his executor. His property consisted of some houses in Limavady, part of the glebe lands of Fahan, and of some personal estate, worth something over £3000.

I shall now read the 5th, 6th, 7th, 9th, and 10th paragraphs of the statement of claim, which succinctly present the case.

[His Lordship read the paragraphs cited by the Master of the Rolls.]

The said Michael King, by a codicil to his will, dated the 26th November, 1894, revoked the devise to the plaintiff of the lands of Fahan, and by a second codicil, dated the 12th December, 1896, he revoked the devise to the plaintiff of the houses in Limavady. He died on the 17th April, 1899, and probate of the said will and codicils was, on the 21st June, 1899, granted to the defendant, Mrs. Frances B. French.

The plaintiff submitted that Michael King had no power to

Appeal. dispose of the property by him derived from John King, except
 1900. in accordance with the arrangement, whilst the defendants con-
 FRENCH tend that the arrangement, although it might have been an
 v. understanding between the brothers, did not constitute a trust,
 FRENCH. which bound the conscience of Michael King, and which it would
 Lord have been inequitable for him to violate or set at naught.
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There is no dispute as to the law of the case, and each side has appealed to the case of *M'Cormick v. Grogan* (1) for its authoritative exposition.

In my opinion "the arrangement," whatever may have been its character, was possibly made, or at all events finally concluded, in the period between the death of Michael King's wife, in 1890, and the death of his brother, John King, on the 13th June, 1891.

Michael King, whilst his wife was alive, had left her by will practically complete control over his property, although he showed he was not unmindful of his brother. When she died the circumstances were quite altered; he had to reconsider his position, and make a new will. He had considerable means of his own; and if his brother's will of the 24th July, 1889, remained unchanged, he should also have regard to the disposal of the property of John King.

These two childless old men had no nearer kin than their nephew, the plaintiff, and the children of his late brother, also their nephew. It was very natural that the two old brothers should discuss how their moneys would be distributed when the survivor died. It is conceded that such discussions may have taken place—indeed that they did take place—but it is denied that the arrangement arrived at constituted a trust, which bound the conscience of Michael, and which it would have been unconscientious in him to thrust aside.

There is no record of any statement of John King on the subject. He was eight years older than Michael, and all correspondence and dealing between the brothers show that John trusted Michael absolutely, and would without hesitation accept all

(1) L. R. 4 H. L. 82.

his statements as of the highest obligation. As to what occurred between the brothers we have the written statements, the admissions and acknowledgments of Michael King, an experienced solicitor, who would not be likely to use idle words, and whose language is, at all events, to have the ordinary meaning of the English language imputed to it. The arrangement, whatever its legal effect, represented the *consensus* of the brothers, and if not arrived at before the will of the 24th July, 1889, it would, at all events, satisfy John that he need make no new will, because he could rely upon Michael to carry out "the family compact."

The documents relied on by the plaintiff did not become known to him until after Michael's death. John said nothing about it to anyone else in his lifetime, and, save in a conversation with an old friend, Michael appears to have kept it secret, and not to have allowed the documents in which he mentioned it to be seen. If a trust, why keep it secret? the defendants ask. It is hard to say; these two old men may have thought it wiser to keep up all Michael's influence in the county and control over his nephew and grand-nephew by leaving him the apparent owner of his brother's property as well as his own. But the question is not why the trust was kept secret, but was there a trust at all?

In the month of March, 1891, Michael King prepared a new draft will for himself, and sent copies of it to the plaintiff, his nephew, and to Mrs. French, the widow of his other nephew. The plaintiff did not like the will, and allowed his uncle to know it. Michael King, on the 12th April, 1891, wrote a letter to reassure him.

[His Lordship read the letter.]

The words "if I carry out my present intention" have been relied on by the defendants as showing that Michael asserted his right to dispose of all by will as he wished. But that is not so. He plainly never contemplated telling the plaintiff of any secret trust or arrangement, but it is well to remember that these words were used whilst the two old brothers were alive, and when they might possibly make some alteration in their arrangement, and these words would appear to be used in contrast with the house of Owenbeg, "which you will have under the will."

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The dissatisfaction expressed by the plaintiff possibly led to the preparation of the draft codicil of the 2nd May, 1891, a few weeks later, which contained the first clear and distinct reference to "the arrangement."

The draft will referred to in the letter of 30th March had only given the plaintiff Owenbeg. In his letter of 12th April Michael had endeavoured to appease the plaintiff by telling him that in addition to Owenbeg, which "you will have under the will," he would also get at his death property worth at least £3000, and £2000 of money, plainly meaning, though not saying, the Rev. John King's property. In the draft codicil of 2nd May, 1891, he expressly dealt with the contingency of his surviving his brother, and succeeding to his property, and plainly intending to meet his nephew's objections, and to carry out the arrangement, he practically did thereby leave all John's property to the plaintiff. At the close of this draft codicil comes the significant words: "I make this codicil in pursuance of an arrangement with my brother that the property and money the subject of this codicil should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King. Should my brother survive me he will make a new will, carrying out the provisions of this codicil."

It is difficult to conceive more clear or cogent words. It states that he had arranged, that is, agreed, with his brother that such a disposition should be made, and the closing words distinctly import that the brother had arranged and agreed that if he survived he would make a new will to the like effect.

The Rev. John King did not survive, having died on the 13th June following. Michael King then embodied the substance of the codicil in a draft will, and sent it on the 15th July to Mrs. French.

This draft will omitted the reference to "the arrangement" so clearly stated in the draft codicil I have just read. It would seem as if Michael King shrank from giving any publicity to this in his lifetime, and was unwilling to allow his nephew to know the independent position he was in so far as related to the property of the Rev. John King. This comes out with even more

distinctness in an unfinished letter of this same date, of the 15th July, addressed to Mrs. French, but not completed or signed :—

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“LONDONDERRY,
“15th July, 1891.

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“MY DEAR FANNY,—

“The death of my brother and other matters delayed the enclosed. You said you would show it to Mr. George Hart. I wish you to do so. My only object is to have it so framed as to save those who succeed me from trouble and litigation. I have left John French my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to John and mine to William. I have struck out his name as trustee, and in consequence taken away from him the Government annuity payable out of the holding of my father which he gets. This £54 8s. 10d. was given him by the first draft, and was to be paid by you, and was intended to be remuneration for his services as trustee now dispensed with.”

The words of this letter are not verbally identical with those in the draft codicil, but they are in substance the same, and the greatest weight must be given to the words “it being arranged between us that his property was to go to John and mine to William.” The same feeling which induced him not to state in his executed will “the arrangement” mentioned in his draft codicil plainly induced him not to send the incomplete letter referring to that arrangement. Mrs. French is clear that no such letter was sent to her, and therefore it is manifest that rather than send it he took the trouble of writing a shorter letter (omitting this statement) enclosing the will.

Then on the 19th October, 1891, Michael King executed a will embodying the provisions of the draft codicil, and practically carrying out the terms of the arrangement made between him and his brother.

The draft codicil of 2nd May, 1891, and the unfinished letter of the 15th July, 1891, are the strongest pieces of evidence in support of the alleged secret trust, and they derive some support from the oral evidence of Miss Ellen Macartney, an old friend of Michael King, who had an important conversation with him at his residence on the subject of his will. The date is not closely fixed, but it was certainly after the death of the Rev. John King,

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and may have been in 1891, 1892, 1893, or 1894. I should say it was while the will of 19th October, 1891, was in operation as the last testamentary disposition of Michael. Her words are not at all conclusive, but they support and are entirely consistent with the equity relied on by the plaintiff.

At the close of 1893 Michael King would appear to have commenced to desire to take away from his nephew, the plaintiff, some of the property of the Rev. John King. By a codicil dated 2nd December, 1893, he revoked the legacy of £2500, and directed it to fall into his residuary estate, that is to go to his grandnephew, whom he had selected as the object of his own special bounty. By a further codicil, dated 26th November, 1894, he revoked the devise to the plaintiff of the lands of Fahan; and by a later codicil dated 12th December, 1896, he revoked the devise to the plaintiff of the houses in Limavady. These acts diverted altogether from the plaintiff the entire property of the Rev. John King, and completely set at naught "the arrangement" referred to so often.

The dates of the codicils show that Michael King proceeded by stages, and that it took him three years to decide that he would wholly deprive the plaintiff of the benefits distinctly contemplated in this arrangement.

There is a remarkable document in existence which proves conclusively that Michael King felt that in these codicils he was not dealing as an ordinary testator with his own property, and that he felt the need of cheating his own conscience by an effort at exculpation, and may be of leaving behind him what might be regarded as a mitigation of his conduct.

It is the strange "partnership memorandum," dated Dec., 1893, to which I am entirely unable to give any insignificant meaning. It was in my opinion framed and added to by a man who knew he was bound by arrangement, and had made up his mind he would get out of it codicil by codicil. It is manifest he was not happy over the business. Mr. French indignantly repudiates that there was a vestige of foundation for any of the suggestions in the memorandum, and the fact stands out conspicuously that neither he or Mr. Ingram, his partner, ever heard from Michael King in his lifetime a single syllable of objection or

complaint on the subject. What meaning can be given to the words: "I am willing to accept the cancelled legacy in full of all my demands," unless it be that the cancelled legacy was the property of John French under the arrangement, and that he, Michael King, would take it and keep it for himself as a set-off against these alleged demands he had against John? The word "accept" is full of the deepest significance. It shows that the demands were his own, and the legacy was the plaintiff's, and that he was making a desperate effort to justify his action by setting off the one against the other.

I can see no possible way of explaining away this memorandum. The fact of its existence is important, and I regard its words as affording strong and powerful proof in corroboration of the plaintiff's case.

It is keenly urged that the secret trust cannot be established without imputing personal fraud to Michael King, and that the Court should shrink from any finding that would be hurtful to his reputation without clear proof. I do not question this, but if I arrive at the clear conclusion that Michael King entered into the arrangement he himself admits, then I am bound also to hold, in my view of the case, that the arrangement, in the words of Lord Hatherley, "fastened upon his conscience the trust of carrying it into full effect." I do not wish to say anything rudely harsh of this gentleman, but I cannot shrink from doing the plaintiff justice from any sentimental feeling about his uncle. I am not, however, indisposed to take the view of the Master of the Rolls on the subject, and to hold that Michael King may possibly have misconceived the binding nature of the arrangement he had entered into, and did not duly recognize the stringency of the trust to which he had agreed. For I hold on the facts that the arrangement between the brothers constituted a secret trust between them, that Michael King accepted this trust, that for a time he acted on it and obeyed it, that he admitted and acknowledged it, and that when he sought to divest himself of its obligations, he under his own hand wrote an excuse which, like many another excuse, is really an accusation against himself.

The inferences from the conduct of Michael King are clear and

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obvious, but I am not driven to mere inferences. I have his plain and unqualified statement in writing showing the impression and belief under which he had left his brother, and the arrangement absolute and precise which he had made with him. That arrangement fastened irrevocably upon his conscience the trust of carrying it into full effect. All his acts immediately after his brother's death show with unmistakable clearness that he deemed it his duty to lose no time in satisfying the obligations he had incurred. Unfortunately, he afterwards commenced by piecemeal to get rid of his trust and to break his arrangement. In my opinion his "partnership memorandum"—to which I have referred—demonstrates that he knew he was breaking the trust of the arrangement, and endeavouring to leave behind him a kind of excuse for departing from the obligations he had made. I hold that as he knowingly made the arrangement he also knowingly broke it. I think his conduct satisfies all the requirements for relief laid down in the case of *M'Cormick v. Grogan* (1), and I cannot see why injustice should be done to the plaintiff by hesitating to give him the relief to which on the facts I believe him to be entitled.

The facts of *M'Cormick v. Grogan* (1) are quite different from those of the present case; but the principles laid down in the judgment, and particularly by Lord Hatherley and Lord Westbury, to my mind entirely support the conclusion at which I have arrived.

Concurring as I do with the Master of the Rolls, I do not deem it necessary to say anything on the suggestion that there is any case for election.

On the whole case, I think that the order of the Master of the Rolls was right, and should be affirmed and this appeal dismissed with costs.

FITZ GIBBON, L. J. :—

Before we approach the question of fact, upon which the decision of the case depends, we should define the conditions which the plaintiff must satisfy. The ground of relief which he must prove should be stated in language understood in a Court

of Equity. To create a secret trust—indeed to create a trust at all—the person charged as a trustee must be proved to be bound by an obligation affecting his conscience. To bind the conscience by a secret trust is difficult, because the Statute of Frauds—and in this case the Wills Act also—must to some extent be got over. It has to be shown that it is *inequitable* to allow the alleged trustee to hold or dispose of property as his own, though he holds it by a legal title *prima facie* absolute.

The foundation of relief must be *unconscientiousness* in the using by the person charged for his own purposes of property which he knows that he ought to hold or use for the benefit of another. It is idle to attempt to minimise or to gloss over the foundation of the equity. If the right to relief exists, its foundation must be *fraud*—"personal fraud" Lord Westbury calls it in *M'Cormick v. Grogan* (1). Conscience cannot be unconscience; to bind his conscience the trustee must know that he is one. It is impossible in the present case to give relief to the plaintiff, unless we find in fact that Michael King knew that he was bound to his brother John to give the property now claimed to the plaintiff, and *knew* that he could not give it to anyone else at his death, or dispose of it in his lifetime without violating conscience. This obligation must have been voluntarily and knowingly undertaken by him, and his brother must at the same time have entered into a similar obligation to take effect upon Michael's property if John should be the survivor. Its date can be fixed within narrow limits. Michael King's legal title is derived under John's will, which was made on July 24th, 1889. That will, with no changes except an increase of £100 in a legacy to a housekeeper, and the addition of a legacy of £200 to a friend, had been in existence since 1883—re-executed in 1886—and again in 1889. When that will was made Michael King's wife was living. Under a will of August 31st, 1888, she was her husband's sole executrix, the beneficial tenant for life of all his property, with an absolute power of appointment over it, and in default of appointment by her it was to go to John. During her life there is no shadow of evidence that either brother

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had any idea of a secret trust. She lived until September, 1890. Mr. Ronan, under the invincible pressure of the facts, admitted that whatever "arrangement" Michael made in favour of the plaintiff was not made until after his wife's death, and therefore not until after John had made the will which gave to Michael the property upon which the secret trust is now alleged to have attached. Therefore, any obligation which Michael undertook cannot have been a condition of the making of John's will, but was only a condition of the non-revocation of it. I admit that such an obligation is possible, but no instance of it has been proved until this case, and it certainly requires stronger and clearer evidence to prove a change of intention, and the conversion of a beneficiary into a trustee, than to prove an original intention to affect property by a trust when it is first given.

This case goes farther. The trust is not confined to John King's property; it extends to Owenbeg, Michael King's own absolute property. The Master of the Rolls has held that "Owenbeg was not free disposable property of the testator, for he had bound himself, in conscience, and for very valuable consideration, to leave it to John French as he did." On that ground he has held that John French is not put to election. "It would be curious," he says, "if a trustee under a secret trust could get rid of half his liability by performing the other half of his obligation."

Furthermore, the class of evidence upon which the plaintiff relies is unexampled. Until now no secret trust has been established without some evidence coming from the supposed obligor showing *his* intention to create the trust. Nothing has been proved to show that John King, the supposed obligor, ever asserted that Michael was a trustee, or indicated that the plaintiff was an object of his bounty. From 1883 to 1890 he certainly had the contrary intention. During all that time his property was intended to pass absolutely to his brother, who had made a will under which it would pass on to the brother's wife. It *actually did* pass to the brother under a will originally made with that intention.

There being no evidence emanating from the creator of the supposed trust, the case becomes still more extraordinary from the

fact that the only evidence of trusteeship is found in one or more of three documents written by the supposed trustee, all of which are imperfect, and none of which saw the light until after his death, corroborated by a vague conversation with a lady, which is described by the Master of the Rolls as "in itself falling short of establishing a trust." Michael King's utterances, written or oral, are the sole foundation of the suit. They are not suggested to be *declarations* of a trust emanating from his own volition. If they are anything cognizable in equity, they are *admissions* or *acknowledgments* of a trust undertaken by Michael with John. To found any right to relief, or to affect property, they must amount to admissions of an equitably effective obligation affecting Michael's conscience. As he certainly dealt with the property inconsistently with such an obligation, and for eight years treated it as his own—held himself out to both the plaintiff and the defendant as being free to dispose of it by his will—and even consulted them about the disposal of it—if these documents prove a trust, they must amount to confessions of fraud and hypocrisy as inconsistent with the possession of sense by a dishonest man, as they are inconsistent with the unblemished character which Michael King bore in his lifetime, and with the affection and bounty which, at first in a large degree, and to the last in a substantial degree, he showed towards his nephew, the plaintiff, whom he is now alleged to have been defrauding all the time. It is said that he was trying to justify what he was doing. If his statements were only explanations of honest motives, or of acts which he was free to do, they cannot evidence a trust. The plaintiff cannot escape from the necessity of proving that they were, at best, vain excuses for a fraud which they disclose.

The case has the further peculiarity that no adequate motive has been shown for the adoption of a secret trust, as the means of affecting the alleged intention of John to give all his property, and of Michael to give Owenbeg to the plaintiff, after the death of whichever brother should survive. No reason has been suggested for Michael's accepting the position of a trustee, nor for concealing it if accepted. If he descended from the position of an absolute beneficiary to that of an equitable obligee, he must have at once become a consciously fraudulent trustee, for he

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immediately began to deal with the property as his own, and his sudden lapse from honesty is unexplained. *Nemo repente fuit turpissimus*. Lastly, John's desire to benefit the plaintiff and Michael's obligation to do so were never communicated during the lifetime of either John or Michael, either to the plaintiff or to Mrs. French, who was treated as her son's guardian, although both of them were repeatedly communicated with, and consulted by Michael King with reference to his disposition of the property, and although he, with unusual confidence, let them both know his testamentary intention before he executed the first of the testamentary instruments which constitute the legal title, but which are now alleged to be fraudulent, and consequently inoperative dispositions of what was not his to give.

I shall not define the degree, the clearness, and the character of the evidence which a Court of Equity requires before it will enforce such a trust as that upon which this suit is based. If I take the definition of the issue, as Mr. Ronan asked us to do, from *Chester v. Urwick* (1), and admit that an "arrangement" may create a trust, I must take the statement of the principles upon which we must deal with the issue, and the description of the proof which the plaintiff must give from *M'Cormick v. Grogan* (2).

The question is, whether the documents written by Michael King, and found after his death, can be reconciled with rectitude; or whether they are coercive proof of his having undertaken a trust on the faith of which his brother left his will unrevoked, and which, if undertaken, was at once betrayed. It is a hard issue to sustain. Before we find Michael King guilty, we ought to take into account his character, conduct, and position—his relations with his brother—his feelings from time to time towards the plaintiff, the defendant, and her son—the nature and terms of the documents and statements relied on—in short, all the circumstances of the case from beginning to end. To sustain the decree we must be able to say without doubt—*Habemus confitentem reum*.

What is the alternative? It seems to me to be a comparatively easy one. It all depends on the meaning of what Michael King

(1) 23 Beav. 411.

(2) L. R. 4 H. L. 82.

wrote and said. The choice is between the confession of a trust, consciously contracted in favour of the plaintiff, to induce John King not to change his will, and honest references to the existence, between the two brothers, of a notion—of an intention, nay, even of an understanding—that while each was to be the absolute devisee and legatee of the other, after Michael's wife was gone, the survivor would, at his death, leave John's property and Owenbeg to the plaintiff, and the rest of Michael's property to Michael King French. That such was the expectation of both brothers during John King's lifetime I have no doubt. But it was nothing more than an interchanged confidence between two attached brothers as to their respective testamentary intentions at the time. No trust for any third person—no mutual benefit or binding obligation between themselves—was thought of. It never entered the mind of either that the other, if he survived, should be anything but the absolute taker of what was left to him. Though, in 1891, the prospect of ultimate benefit to the plaintiff, when both should die, was in the minds of both, this benefit was to reach the plaintiff if Michael survived John, through Michael's exercise of his testamentary power over as well his own original property as also over what John left to him. When John left his property behind him, he left it to Michael to dispose of it as his own by the same testamentary power by which John would have disposed of it himself, if he had happened to survive.

Unfortunately for the plaintiff, his uncle's intentions afterwards changed for the worse. The dissatisfaction which the plaintiff expressed in April, 1891, his "looking a gift horse in the mouth," followed in 1893 and 1894 by business friction, not unusual between a retired partner and his younger successor, differences arising from real or imaginary causes, and the desire to make up to Michael King French for the depreciation of the property left to him by diminishing the gifts of the plaintiff, are enough to account innocently for what was done. But we have only to consider whether Michael King had the power to do it, or rather the plaintiff has to prove that he had not.

There are really but three documents to be considered, and but a few words in each of them. I first consider the draft codicil, endorsed 2. 5. 1891, written while John King was alive. It bears,

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Appeal. in the margin, the note—"The Rev. John King having died, the
 1900. provisions of this codicil are embodied in the will." It is further
 FRENCH endorsed—"Make a copy of this will as altered, 1. 7. '91." It
 v. therefore asserts on its face that it is consistent with the will. It
 FRENCH. recites John King's will as giving all his property, including
 Fitz Gibbon, certain specified property, to Michael, who then says—"In the
 L.J. event of my surviving my brother, and of *my becoming entitled*
 thereto as his devisee and legatee, *I* devise and bequeath 'the
 specified property' to John French absolutely." This purports
 to be a disposition by virtue of his having become entitled to the
 property, and the concluding words must, if possible, be read con-
 sistently with such ownership. It concludes—"I make this
 codicil in pursuance of an arrangement with my brother that the
 property and money, *the subject of this codicil*, should go to his
 namesake, John French, *along with my father's residence*" (inter-
 lined); "and that mine should go, as stated *in my will*, to my
 namesake, Michael King." I find nothing in this to indicate
 "mutuality," in the sense of mutual consideration, or of contract,
 or of obligation on both sides. The father's residence was to go
 to the plaintiff under the will of Michael King. The words
 "should my brother survive me, he will make a new will, carry-
 ing out *the provisions of this codicil*," could not bind John. They
 refer to John's property only; for none of Michael's property is
 mentioned in the draft. The whole thing refers to John King's
 specified property only, and it is treated as having been devised
 and bequeathed to Michael, and as being at his disposal. I cannot
 give to the ambiguous word "arrangement" the force of agree-
 ment, of trust, or of obligation. That word alone does not prove
 to me that John King had changed the intention and effect of his
 will—had turned Michael from being the absolute beneficiary,
 which he had been from 1883, until after his wife's death in 1890,
 into a beneficial tenant for life and a secret trustee of the re-
 mainder—and had left his will of 1889 unrevoked upon the faith
 of Michael's acceptance of this altered position.

Nothing short of this will sustain the decree.

Michael King's letter to Mrs. French of January 3, 1891, had
 mentioned his intention "to settle his wordly affairs." In the
 subsequent letters of April, 1891, he consulted both Mrs. French

and the plaintiff about his will, holding himself out to them, and being treated by them, as a free agent. His object is pathetically expressed in his letter to the plaintiff of April 12, 1891:—"I would like to satisfy all, but this, of course, is a thing never done." The plaintiff wrote to Mrs. French on April 4, 1891, that he "never considered in any way what his uncle was likely to do with his money."

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On April 12, 1891, while John King was still alive, and when, if ever, the supposed trust must have been in his mind, Michael King wrote to the plaintiff (and kept a note of it), "*If I carry out my present intention*, you will get at my death property worth at least £3000, and £2000 at least of money, and you will have under the will my father's house, a nicer residence than this, and I hope you will reside there."

No explanation has been offered of this reference to Michael's present intention as the condition of the plaintiff's getting what was certainly John's property. The father's house is Owenbeg, which the Master of the Rolls has held the plaintiff to take, *not* under the will, but in part performance of the secret trust. This letter, written very shortly before John King died, is to my mind inconsistent with the existence then of any mutual trust or obligation between the brothers. It is contemporaneous with the draft codicil, and the two papers must have been consistent, as understood by Michael King, who wrote them both. Curiously enough, the letter uses the very word "arrangement," on which the whole case turns, and uses it in a sense which does not import anything binding—"I intend to make an arrangement about the business after July, when my accounts will be made up."

Had Michael King died before the revocation of his will of 1888, I fail to see how the alleged trust could have been asserted, and if he had not left behind him the three papers, its existence, inconsistent as it is with every act of his life, could never have been even suspected.

The unfinished letter to Mrs. French, dated 15th July, 1891, which she swears she never got, can carry the case no farther than the discarded draft codicil, bearing the dates May 2 and July 1, 1891. Its terms would attach the trust, if to anything, to the

Appeal. whole of John's property, and would attach the same obligation,
 1900. whatever it was, to Michael's property in favour of Michael King
FRENCH French. This letter is inconsistent with the alleged trust as to
v. Owenbeg. The omission of any mention of the "arrangement"
FRENCH. from the completed testamentary papers, lends probability to a
 Fitz Gibbon, similar omission from the letter actually sent to Mrs. French, and
 L.J. thus sustains her recollection that this letter did not mention any
 such arrangement. If we may speculate, I find it easier to believe
 that Michael King thought of speaking of an arrangement with
 his brother in order to give him, in the eyes of his nephew, a
 claim to share in the gratitude for the bounty, than to believe
 that he meant to describe an obligation which bound his own
 conscience.

The third and last document is the "partnership memorandum." It was first drawn up in December, 1893, in contemplation of the will which gave to the plaintiff Owenbeg, Fahan, and the Limavady houses. It is an explanation of the revocation of the legacy of £2500, and the pencil postscript was written after the devise of Fahan had been "revoked by a previous codicil." This memorandum appears to me to be adverse to the plaintiff's case. It proves that the words "arranged" and "arrangement," in Michael King's vocabulary, did not import anything binding. It was natural enough that a retiring partner should expect that the business debts due *by* him (not *to* him—a mistake occurring twice in the memorandum, and once corrected in pencil) should be paid by those to whom he gave his business. The paper says that he had "no way of recouping himself," *i.e.* that the arrangement had no legal or equitable force. Mr. French swears that it had no existence. When he speaks of "remedy," of "recoupment," and of "accepting" the legacy, Michael King refers to making up his assets, for the other beneficiaries under his will, for the diminution in the value of the property passing to them, by diminishing the amount which he left to the plaintiff. The assertion of his right to exercise testamentary power over all the property, including the £2500, is the most prominent feature of the whole paper. Instead of a confession of a conscious breach of trust, it is an assertion of proprietary right.

It is impossible to say that Michael King at any time honestly carried out the trust, if it existed, for it bound all John's property real and personal, and it bound Michael's property in Owenbeg besides. John King died on June 13, 1891. By the will of October 19, 1891, Michael King gave to John French, not John King's property *eo nomine*, or *in specie*, but Owenbeg with the chattels in it, Fahan, the Limavady houses, and a legacy of £2500, to bear interest at 4 per cent. from his death, not to be called in during the life of Mrs. French (who appears to be about the same age as the plaintiff), so long as the interest should be punctually paid; the same will provided for an accumulating fund to pay off all charges, debts, and liabilities, including the £2500, and at first the plaintiff and the defendant were intended to be the joint trustees to carry out these provisions. The statement of claim offers to take the legacy of £2500 in place of the £2880 15s. 11d., which was the amount of John King's personalty even as sworn for probate. But it is forgotten, when the will of October 19, 1891, is treated as a performance of the trust, that £2500 standing out at 4 per cent. for a young life, to enable the principal sum to be accumulated, is a very different thing from £2880 15s. 11d., down as absolute property under a trust.

The series of testamentary dispositions; the revoked will of October 19, 1891; the codicil of December 2, 1893, revoking the £2500; the proved will of March 16, 1894, and codicils of November 26, 1894, and December 12, 1896, revoking the gifts of Fahan and of the Limavady houses, are all so many declarations of ownership—so many steps in the gradual decadence of his feelings towards the plaintiff inconsistent with the construction of the imperfect, ambiguous, and inofficious documents, which alone are now relied on as coercive proof that Michael King was a secret trustee. If he “misconceived” the obligation, his misconception disproves a trust, for a man's conscience is not bound by what he does not understand.

The suit rests on the allegation of fraud. In my opinion the proof fails, and that being so, the decree appealed from must be discharged, and the action must be dismissed with costs here and below.

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WALKER, L.J. :—

The plaintiff in this action seeks a declaration that Michael King was at the time of his death seized and possessed of the property devised and bequeathed to him by the will of John King, and of the lands known as Owenbeg Cottage, subject to his own life interest therein in trust for the plaintiff, his heirs, executors, and administrators absolutely, with certain other declarations founded upon what I have mentioned. The witnesses on both sides are highly respectable and credible, but unfortunately we are not aided by parol evidence, and are driven to draw all our inferences from the position and acts of parties and written statements made by one of them, with such light as the circumstances throw on those documents.

There is no better established head of equity than that upon which the plaintiff rests his case if only adequate proof to support it be adduced.

If an heir or next-of-kin lead the owner of property by his statement or conduct to believe that if the property be allowed to descend or devolve undisposed of, he will make a provision for some object of the owner's bounty, the heir or next-of-kin will, notwithstanding the Statute of Wills, be compelled by a Court of Equity to carry out the engagement he has entered into.

So if a testator devise or bequeath property to another in terms conferring on the face of the will a beneficial interest upon the understanding or condition assented to by the devisee or legatee that he will hold it upon any lawful trust for the benefit of another, a Court of Equity will fasten upon his conscience a binding obligation to carry out the trust.

And again, if a testator has already made a will in favour of another intended to be a beneficial gift when made, but that other subsequently engages that if the will be not revoked he will carry out some lawful intention expressed in favour of a third party, and thus induces the testator to abstain from revoking the will, a Court of Equity will for the like reason bind him to carry out the intention.

But the equity which the Court administers is founded on personal fraud, and the party bound is converted into a trustee upon the principle that an individual shall not be benefited by his

own personal fraud, and the fraud must be clearly proved. The proof, indeed, may be made out by any kind of evidence satisfactory in itself. It may be established in some cases by silence, but the evidence must be such as to leave no doubt or misgiving in the mind of the tribunal. There can be no presumption to supply the place of convincing proof.

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Further, the cases show that a testator may have a wish or desire as to what should be done with the property, and the wish or desire may have been communicated to the devisee, but if the effectuation of the wish is left in the discretion of the devisee, and is left to be carried out through an act of the devisee, and as a will or gift depending on the devisee's volition, the case falls short of the creation of any binding obligation or trust. In some cases the relationship of the parties to each other and antecedent confidence reposed goes to support the idea that confidence was not superseded by obligation.

The present case relates to the testamentary dispositions of two brothers, the Rev. John King and Michael King. The Rev. John King was a clergyman residing at Fahan Rectory, in the county of Donegal. Michael King was a solicitor and country gentleman in Londonderry, living at a place called Strangemore. They had a sister married to a gentleman named French, who left two sons—the plaintiff, John Alexander French, a solicitor, and a son William, a barrister, who died in 1887, leaving, amongst other children, a son, the defendant, Michael King French. The property of John King consisted of three houses in Limavady, and part of the glebe lands of Fahan, and of personal estate of the value of £3000 or thereabouts.

The property of Michael King was considerably larger, and it included a residence called Owenbeg, which had belonged to their father.

John King was considerably older than Michael, and in 1883, when the transactions relating to John's will began, he was aged 75 years, and Michael was about 67. The brothers were on terms of close intimacy and affection.

It is only by a chronological statement of facts that this case can be properly understood, and from the importance of the case I must be pardoned for so dealing with it.

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John saw Michael in Derry in July, 1883, when a draft will was prepared for John by Michael on John's instructions, and sent to John some days before the 27th July, 1883.

On the 27th July John wrote to Michael: "Since seeing you it has occurred to me that the clause in my will requesting books and manuscripts to be burned would appear strange in a document which may be subjected to public inspection. Might it not answer the purpose to expunge that clause and insert books and manuscripts with household furniture, plate, &c.? I could put on a sheet separate from the will my wish respecting books and manuscripts."

Michael replied on the 28th July: "A general will can be made; it will be equally effective, but I did not like to depart from your own words which embody your intentions clearly. I sketch a short general will for you underneath. I had not time to write it before post time. Any directions you put into your will I shall carry out as far as in my power." He sketched a draft will, and John replied on the 30th: "I have received your amended copy of my will, which is a great improvement."

It is obvious that the clause in Michael's letter relating to the carrying out of John's wishes refers to the books and manuscripts. In this instance, when John desired a direction to be given, he put it into writing.

John King made his will dated 9th August, 1883; he appointed Michael executor; bequeathed a legacy of £200 to Mary Johnston; and then proceeded: "I devise and bequeath all the real and personal estate and property to which at my death I shall be entitled beneficially or of which I shall have power to dispose beneficially by will (and not hereby or by some codicil hereto otherwise disposed of) unto my said brother, Michael King, hereby appointing him my sole residuary devisee and legatee." He sent it to Michael on 12th December, 1883, with a letter stating, "I send my will, which has been some time made. Should you think the legacy to Mary Johnston not sufficiently large you can add to it," and accompanying the letter there is a signed direction—"Michael King is to keep any books he may select, and all others, and all manuscripts, if sold in Ireland, to be sold in Belfast or Dublin, or may be burned." This dealing as to a trust

outside the will, even as to this trivial matter, requires to be borne in mind.

John King made another will, dated 11th February, 1886, which was identical with the former one, save that the legacy to Mary Johnston was increased to £300.

In July, 1889, John King appears to have been desirous to make some alteration in the will, and he wrote to Michael for it, and received it on the 20th July, 1889, and by his letter of that date he would appear not to have remembered that the clause about his books was in a separate writing, but he probably received a letter satisfying him on that point. He made a new will, dated the 24th July, 1889, which was the same as the former one, save that he left the Rev. E. G. Dougherty a legacy of £200; and, again, Michael appears his sole residuary devisee and legatee. John King died on the 13th June, 1891, and the residuary account was passed by Michael on the 28th August, 1891, as the sole person absolutely entitled beneficially after debts and legacies. Thus up to the death of John King, at all events, all the acts of John and Michael King and the written evidence supplied by their letters go to show that Michael was entitled beneficially without any trust imposed on him. There is certainly not a particle of proof to the contrary, and the will of Michael King of 31st August, 1888, goes to show that no trust was imposed on him in favour of John, for by it he left all his real and personal estate to his wife for life, and after her death to her general appointees by deed or will, and subject thereto to his brother John King, and I think it is clear that no trust can be suggested to have been in existence till, at all events, after the will of 4th July, 1889, was made, and therefore the equity on which the action appears by the statement of claim to be founded cannot be established. The plaintiff's case is put forward specifically in the 5th paragraph of the statement of claim, and it is that when this will of 24th July, 1889, was made or in prospect, there was an arrangement and agreement between the brothers that "the property so left by John King, together with the house and lands known as Owenbeg Cottage, Dungiven, which had been their father's residence, and had become the property of Michael King, should on the death of the said Michael King go to the plaintiff; and the said Michael

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 1900. said John King, and the same was devised and bequeathed to him
 FRENCH by the said John King on the terms and on the condition that on
 v. his death he would leave the said property left to him by John
 FRENCH. King, and the said house and lands of Owenbeg Cottage to the
 Walker, L.J. plaintiff."

Michael King's wife died in September, 1890, and this event apparently diverted the ideas of Michael King into the direction of dispositions in favour of his nephews, who were then the only natural objects of bounty.

On the 3rd January, 1891, he wrote to his nephew's widow, after referring to the death of her husband: "This reminds me that I must settle my worldly affairs. Which of your boys would you like me to leave this place to? The house over the bridge now renewed, will go to Johnny (Claude), and this place to one of your sons. I have an idea that William would have wished it to go to the youngest, called after me. I would like to do what would be agreeable and satisfactory to you."

He prepared a draft of a will on the 30th March, 1891, and sent it to his nephew, the plaintiff, "for his perusal and advice," asking him to let Fanny see it.

This draft, so far as material to be stated, appointed the plaintiff and Fanny French trustees. He bequeathed to his brother John the interest on two sums of £800 and £100, one half of two mortgages described, and after his death to fall into the residue. He gave Owenbeg to the plaintiff, and his own residence of Strangemore and his real estate to his grand-nephew, Michael King French, whom he calls Michael King, if he attained 21, and if he died under 21, to such of the other sons of Fanny French as attain that age, and he devised and bequeathed all the real and personal estate, to which at his death he should be beneficially entitled, or of which he should have power to dispose beneficially upon trust to convert, accumulate, and pay charges, and subject thereto in trust for Michael King French, in the same terms as in the gift of his real estate.

The plaintiff sent on the draft to Fanny French, with a letter dated 4th April, in which he found fault with the provisions in the draft, saying, "My uncle is leaving Strangemore, and

virtually the whole of her property to a child who has no connexion (except a mere nominal one) with the place. One would have thought that he would have left Strangemore to me." Mrs. French replied to him on the 6th April, justifying the draft, on the ground that it merely put her and her sons in the place of the eldest nephew—her late husband. The plaintiff on the 7th April wrote to Michael King, putting forward his objections to the draft dispositions, adding, "as things are one would expect a division of the property between William's children and myself, giving them money or a charge on the estate, and that I should have had the place," *i.e.* Strangemore.

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Before referring to the correspondence which followed, it is desirable to state here that the appellant's counsel, on the argument before us, under pressure of the facts, abandoned the case put forward in the 5th paragraph of the claim, and rested their case on another head of equity, viz. that though John King had made a will in 1889, giving his property to Michael beneficially, and free from any trust, a binding arrangement was made some time after the death of Mrs. King in April, 1890, and before the will of October, 1891, and probably before the draft codicil of 5th May, 1891, by which John King stipulated, and Michael agreed that if the will of 1889 was not revoked, Michael would after his own death leave John's property, if he survived John, to the plaintiff, and leave his own lands of Owenbeg also to plaintiff, and that John, if he survived Michael, would make a similar disposition.

It is obvious that this proof of such a trust is made more difficult than the one put forward in the claim, as it proceeds on the basis of the original devise, being a beneficial one.

It is in reference to this alleged arrangement between the brothers that the correspondence subsequent to the plaintiff's letter of 7th April, 1891, to Michael King, becomes extremely material.

In reply to the plaintiff's letter of the 7th April, Michael King wrote to him as follows on 12th April: "I have received your letter; you need not imagine that you have been forgotten. I think my residence and property should go to my eldest uncle" (he means nephew), "if alive, as he is not, to his son, who bears my name. If I carry out my present intention, you will get

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at my death property worth at least £3000 and £2000 at least of money, and you will have under the will my father's house."

This, so far as the letter goes, is obviously the letter of a man who considers he may give or not, as he thinks right, and will give by a will revocable.

There was a written memorandum of same date found amongst Michael King's papers: "Wrote him that if my present intentions are carried out, he will get at my death property about £3000 and £2000 at least in money, and this in addition to my father's residence."

He appears to have considered it desirable to leave behind him in writing his reasons for making a testamentary disposition. They are, however, expressly made dependent upon a power of disposition by will, existing and capable of exercise.

The plaintiff replied, "I am much obliged to you for excluding in my favour the property and money mentioned in your letter."

Michael King proceeded even in the life of John King to carry out what he called "my present intention," for he prepared a codicil on the 2nd May, 1891.

He recited that John King made his will, dated the 24th July, 1889, and thereby bequeathed all the real and personal estate and property of which he might die possessed to him, which property he specifies; and he then proceeded:—"Now, in the event of my surviving my brother, and of my becoming entitled thereto as his devisee and legatee, I devise and bequeath the three houses in the main street of Limavady, the part of the glebe of Fahan, so purchased by my brother, the sums of £800 and £100, making together £900; and the sum of £1000, secured on the property of Col. Lyle, to my nephew, John Alex. French, absolutely;" and he adds—"And I make this codicil in pursuance of an arrangement with my brother that the property and money, the subject of this codicil, should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King. Should my brother survive me he will make a new will carrying out the provisions of this codicil."

Thus, by the letter and memorandum, he would appear to be

carrying out intentions over which he had complete dominion, and he carries them out by an instrument in its nature revocable, and he attributes to John King an intention, if he survived, to carry them out by a similar instrument—a new will.

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It was this addition to the codicil which was relied on by the appellant as proof in itself of an arrangement between the brothers so binding as to make a departure from its terms by either a personal fraud.

Walker, L.J.

There is no evidence whatever of an arrangement binding John King, and, so far as he was concerned, he was free, if he survived, to dispose of his property as he pleased, altering any intention he may have formed or previously interchanged with Michael.

The word “arrange” is susceptible of more than one meaning. It may mean the carrying out of an agreement, or the carrying out of negotiations, in regard to some contemplated act. Its real meaning will often be explained by the nature of the act to be done; for instance, if it is an act into which volition and discretion necessarily enter.

John King died on the 13th June, 1891, and on the 1st July, 1891, Michael King prepared a draft will, incorporating the provisions of the intended codicil of the 2nd May, and he sent the draft to Mrs. William French. There is a contest in the case as to whether it was accompanied by a letter, dated the 15th July, a copy of which was found amongst his papers. She acknowledged the receipt of the draft of the 15th July; but she denies the receipt of the letter of the 15th, and the Master of the Rolls accepts her statement.

The letter of the 15th, on which also strong reliance was placed by plaintiff's counsel, is in the following terms:—“The death of my brother and other matters delayed the enclosed. You said you would show it to Mr. George Hart. I wish you to do so; my only object is to have it so framed as to save those who succeed me from trouble and litigation. I have left John French my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to John and mine to William. I have struck out his name as trustee, and, in consequence, taken away from him the Government annuity,

Appeal. payable out of the holding of my father, which he gets. This
 1900. £34 8s. 10d. was given him by the first draft, and was to be paid
FRENCH by you, and was intended to be remuneration for his services as
v. trustee now dispensed with." I think that letter is more con-
FRENCH. sistent with the position of one who considered himself owner.
 Walker, L.J.

Mrs. French acknowledged on the 18th a letter and the draft of will. There is no proof that she received that of the 15th. On this point the Master of the Rolls accepted Mrs. French's statement. The condition of the writing found would appear to support her statement.

Michael King did not, in fact, execute his will until the 19th October, 1891. By it he appointed Fanny French trustee and executrix. He gave Owenbeg to John A. French, subject to the terminable annuity of £34 8s. 10d., also the glebe lands of Fahan, the three houses in Limavady, and he also bequeathed to him the sum of £2500, to bear interest at 4 per cent., which was not to be called in nor payment required of his executrix during her life, so long as the interest was paid half-yearly within sixty days, and he gave Strangemore and his real estate specified to Michael King; and the will also contained a general devise and bequest of all the real and personal estate which at his death he should have power to dispose of unto his trustees, upon trust to convert, accumulate, pay debts and charges, "and the legacy of £2500, hereby bequeathed" and subject thereto in trust, for Michael, at 21, whom he desired to take the name of King.

On the face of the will it appears to operate in full testamentary power over property which he was competent to dispose of; and it is the case of the plaintiff that the sum of £2500 left him, which he calls "a legacy," is not the amount of the personal estate of John King which he was entitled to claim, and also that it was not competent to Michael King to impose the conditions in respect of it which he did.

There is no doubt that subsequently Michael King altered, from time to time, to the prejudice of the plaintiff, the dispositions in his favour. The first alteration was made in respect of the £2500 legacy. Michael King, the plaintiff, and a Mr. Ingram had entered into partnership, and Michael King considered that a partnership arrangement made in respect of business debts due to

him had not been carried out, and he drew up a statement accompanying the codicil of the 2nd December, 1893, which is strongly relied on by plaintiff's counsel. This codicil of the 2nd December, 1893, recites his will, and a bequest of £2500 therein to J. A. French as from his own bounty, and that he was desirous of cancelling it, and he accordingly revokes the bequest.

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This all proceeds on the basis of testamentary intention altered.

As in other cases, he desires to leave behind him, though undisclosed, his reasons for the alteration. Accordingly, we find the memorandum about the partnership of same date. It recites an arrangement at the time of the partnership between himself, French, and Ingram, that the business debts should be taken over by that firm, and it recites that this was not done, and that the debts had been charged to his private account with the bank. He then proceeds: "I have no way of recouping myself except by charging the loss against the benefits to be derived by French, one of the partners under my will, and which the codicil executed to-day depriving him of a cash legacy of £2500, will to some extent remedy."

He then says in effect: "French has no right to expect that I will leave my assets charged with these debts which he and his partner should have paid," and he adds: "I am willing to accept the cancelled legacy in full of all my demands, and my partners can easily arrange between themselves the payment of this money after my death."

As I read it he says: "I limit my demand against French and his partner to £2500, which is the cancelled legacy he would have got. He is not to get the legacy while he is a debtor to my assets. He has put me to a loss exceeding £2500 probably, and thereby reduced my assets at the expense of my residuary estate, but I will take it as if it were £2500, and my cancelled legacy shall go to indemnify my residuary legatees up to that amount at which I limit it." He is acting on a right in himself to alter as any testator unfettered by trust might. Perhaps the Master of the Rolls put the same interpretation on the memorandum as I do, for he places no reliance on it. It seems to me that the testator is merely giving a reason—whether it be good or bad—for the

Appeal. alteration. But why should he write it if he were expressing a
1900. salve to his conscience, and justifying the commission of a fraud?

FRENCH Why leave behind him a record of its commission?
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FRENCH. The will of 16th March, 1894, merely incorporated the effect

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The codicil of 26th November, 1894, revoked the gifts of the lands of Fahan, and a further codicil of the 12th December, 1896, revoked the devise of the three houses in Limavady, and gave them to his residuary devisees, but he gives the reason for this alteration to be the reduction under the Land Act of the rents of the estates given to his residuary devisees.

In reference to the codicil of 1896, there appears amongst his papers the following memorandum:—"The sum of £2500 and the lands of Fahan being insufficient for this purpose, I am reluctantly obliged to revoke the devise or gift given by said will of the lands of Fahan, and of my three houses in Limavady devised to Mr. French."

In all these instances he has followed his former precedents of leaving behind him a record of his reasons for altering his testamentary dispositions, and it may be well asked why he should leave such a record if he were conscious of violating an obligation and committing a fraud. The question is whether the changes are not more consistent with a change of testamentary intention whether for good or sufficient reasons. They seem quite inconsistent with any fraudulent design on his part, and it is impossible to reconcile honesty of purpose on his part with the making of the alterations if he was bound. At the same time I think it is very probable that his regard for the plaintiff had been diminished gradually since 1891.

We are now starting with the assumption that those two brothers, trusting each other implicitly, made testamentary dispositions up to 1891, by which no trust was imposed, and that Michael King was left a free master to deal with what was devised to him. Is there any motive which can be suggested for the imposition of an undisclosed trust? There was a memorandum in writing about the books, &c., in 1883, when he meant that Michael King should know and act on it. Why are we to assume that John King did not absolutely trust his brother's

discretion or that suddenly in 1891 he imposed on him a secret trust? They were both old, each was the first object of the other, and the sister's children came next in regard, but designed to claim through a brother not against him. I cannot imagine that if John King had been asked whether he meant that Michael should be bound to leave all his (John King's) property to the plaintiff, he would not have replied that we have had an interchange of intentions on the matter, but I trust him to deal with the property according to his sense of right, he knowing my wishes, as we have discussed them together. Plaintiff's counsel, in casting about for reasons for the concealment of the trust, suggested two—one that John King did not wish to lessen the status of Michael King in the country by giving him a limited interest. This appears a far-fetched notion, and seems disposed of by the admission that the devise was beneficial up to 1891. The other was that it was not desired that the plaintiff, with whom a partnership was contemplated, should consider himself independent of Michael King's control. This notion could not have influenced John King when he imposed the alleged trust, and the terms of the will of 1891 were not concealed.

The two documents of 2nd May, 1891, and 15th July, 1891, are quite consistent with Michael being absolute owner. They are both referable to the words "my present intention" in the letter of April, 1891, and they are both left undisclosed. They are part of the series of written reasons left behind him for his testamentary acts. If the facts are consistent with a discretion being left in Michael King, he cannot be convicted of fraud, and that must be affirmed of him "without any misgiving or possibility of mistake."

Is it not more natural that John King intended after his decease to set up "not an executor or trustee, but as it were a second self to whom he communicates confidentially his ideas as to the distribution of the property, but at the same time desires to invest with all his own irresponsibility in carrying this into effect?" That is the view put forward in *M'Cormick v. Grogan* (1) on the facts there, and the same view was taken on the facts in *Creagh v. Murphy* (2), where the trust was attempted to be proved by Murphy's acknowledgment, but the arrangement was one more consistent with

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(1) L. R. 4 H. L. 82.

(2) I. R. 7 Eq. 182.

Appeal. the retention or committing of discretion. It seems to me that
 1900. the inferences from the facts in the case are repugnant to the idea
FRENCH of a binding obligation imposed by the one brother on the other,
v. and especially in the case of Michael King, one imposed by in-
FRENCH. ference from ambiguous language upon what was up to 1891 an
 Walker, L.J. admittedly beneficial devise.

In my opinion there was no trust, though there was interchange of intention, and all the acts of Michael King are consistent with the existence in him of a full discretion reposed in him by his brother. Unless that can be disaffirmed without doubt or misgiving, fraud cannot be imputed or found.

I see nothing in the facts of this case to impute such fraud to Michael King, and I therefore think that the decision of the Master of the Rolls should be reversed, and the action dismissed.

G. Y. D.

H. L. The plaintiff appealed to the HOUSE OF LORDS (the Earl of
 1901. Halsbury, C., and Lords Shand, Davey, Brampton, and Robertson).
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Ronan, K.C., and *Matheson, K.C.* (with them *Dixon*), for the appellant.

Haldane, K.C. (of the English Bar), and *Jellett, K.C.* (with them *Chaytor*), for the respondent.

[The following cases not referred to in the Court below were cited :—*Drakeford v. Wilks* (1) ; *Wallgrave v. Tebbs* (2) ; *Moss v. Cooper* (3) ; *Dufour v. Pereira* (4).]

Dec. 9. THE LORD CHANCELLOR :—

My Lords, it appears to me that this case depends upon the determination of a comparatively simple question of fact, and, indeed, I do not think that either of the learned counsel for the respondent who have addressed your Lordships suggested any doubt that, if the fact relied upon by the appellant is made out, any question of law arises upon it. There can

(1) 3 Atk. 539.

(2) 2 K. & J. 313.

(3) 1 J. & H. 352.

(4) Dick. 419.

be no doubt that if, whether by acquiescence or by positive agreement, the testamentary disposition of one person is taken as an arrangement with another, the person with whom that arrangement has been made is not at liberty to disregard the trust which has been imposed upon him, and although in point of law the whole of the property may be left to him, nevertheless, the Courts will fasten upon his conscience the fulfilment of that trust by which he became the legal owner, or the owner to the full extent of the property so left to him charged, I think one may say, with the execution of the trust in question.

It comes, therefore, to be a simple question of fact. What are the facts in respect of which this suit is brought? Up to a certain time the parties, I think, are not at variance as to what the views of the persons concerned were. It cannot be doubted, I think, that that, which the only witness who gives relevant evidence upon the subject testifies to, was the general view which under the circumstances was entertained by both these old gentlemen. To my mind that evidence is very important evidence indeed. Miss Macartney is admitted to be perfectly respectable, and, so far as I have heard during the argument, a person perfectly to be relied upon both in respect of her accuracy and in respect of her good faith; and, if the conversation took place which she alleges to have taken place, there is no doubt at all that at one time (whether it continued afterwards or not) it was in the mind of Mr. Michael King that he was under an obligation to leave the property as it is contended now by the appellant: "I remember sitting with him," says Miss Macartney, "in the drawingroom. He had something in his hand. He was reading his will; I did not know it. He asked me did I know what he was reading. I said, how can I tell? He said it was his will, that he did not approve of splitting up properties; that he would leave his heir his personal property. He said to me, tell me what do you think? I said, how can I? He then spoke of other property that belonged to John, and said that property was to go to Mr. John French, and that he would have it for his lifetime. He said it was a good deal of property. He said there was a good deal at Fahan, where he used to reside, and also at Limavady. He spoke of one or two arrangements that he had made; he referred to the conversation

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he had had with his brother John. He said that Mr. John King had said he would take care of John if Mr. Michael King would take care of William. He told me that that was what Mr. John King had said to him; he said that he quite agreed that this property was to be John French's. He said that that was what he intended to do. That was his meaning. Did he tell you that he had told his brother John that he agreed to that arrangement? He said he was certain that he had agreed. They were agreed."

Now assuming that to be perfectly true—and it appears to me there is no suggestion that the witness was under any desire to do anything but speak the truth—it certainly is a strong thing to say you must disregard altogether his conversation, taking place after the death of the brother John, with this lady. If there was nothing else in the case I suppose a great difficulty might have arisen in giving meaning and effect to the words to which she speaks, because if there was nothing to tell us what the exact arrangement was there might have been a difficulty in carrying it into effect; but dealing with it as a question of fact, whether there was any arrangement between the brothers or not, I confess, my Lords, I am unable to entertain a doubt that there was an arrangement between the brothers, and that they had discussed between them what was to be the arrangement which they intended to make as to their several properties. That is the first observation that strikes me about it, and I certainly hold it to be proved as a matter of fact that there was an arrangement.

My Lords, what that arrangement was there might have been more difficulty in ascertaining except for what follows. It being established that there was an arrangement, let us see what that arrangement was. I think the whole of the document I am about to refer to ought to be regarded, not only what one might describe as the cardinal parts of the document, but the document itself in its entirety. In the handwriting of Mr. Michael King himself, at the commencement of this document, there is this: "The Rev. John King having died, the provisions of this codicil are embodied in the will." That is Mr. Michael King's own statement of that which is about to follow; and then comes what is to me as distinct and definite a proposition as could well be imagined in writing: "I make this

codicil in pursuance of an arrangement with my brother that the property and money, the subject of this codicil, should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King. Should my brother survive me he will make a new will carrying out the provisions of this codicil."

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My Lords, I confess if that had been written by the merest laymen I should have had a difficulty in saying that it was not sufficiently clear. But we are dealing here with an experienced solicitor, a man of business; and at the commencement of his codicil he says that his brother having died, the event having happened, this codicil he is making is the carrying out of the "arrangement" made between us; and then he deliberately writes this statement which to my mind is perfectly clear—indeed words fail me to emphasize that. I cannot imagine that anything could be more definite or clear than what is there stated. The only comment I have heard upon it is that which Mr. Jellett has made with great earnestness: that it is not signed. What then? We are not dealing with any operative document which is supposed in itself to dispose of the property. We are dealing here with what is—I do not care whether it is called an "arrangement," a "bargain," or a "contract." If I were asked, and if it were necessary to determine that question, I confess I should have no hesitation in saying that a contract was here established, but it is not necessary to decide that. What one is dealing with is the question whether or not there was such an arrangement as would bind the conscience of the testator; and I do not hesitate to say that to my mind it is perfectly clear that that document under the hand of Mr. Michael King, whose estate is sought to be charged, is as clear and definite a statement of an arrangement, contract, or bargain as could possibly be conceived.

My Lords, for my part I should be content if the case stood there; but I do not think it does. In pursuance of that there is the will of the 19th of October. Mr. Jellett has very ingeniously endeavoured to show that that does not carry out the arrangement. Whether it does or does not strictly and literally is not the question which your Lordships have to determine, but looking at this as a corroboration of what Mr. Michael King had agreed to do, it

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seems to me to be manifest that substantially it does comply with what I have described as the bargain between the parties.

It is not necessary to proceed further in the history of the case than this, that when one looks one sees that little by little as time goes on the impression on the conscience of Mr. Michael King having apparently a little faded, first one thing and then another is taken away, but the mode in which it is done and the circumstances under which it is explained seem to me to be strongly corroborative of what has been stated as the original arrangement. Did anybody ever hear of a testator free to dispose of property during his lifetime using such a phrase as he has used with regard to the taking away of the legacy of £2500? After speaking of what in his view is a grievance, that the arrangement as to the business debts has not been carried out, he goes on to say: "I have no way of recouping myself except by charging the loss against the benefits to be derived by Mr. French, one of the partners under my will, and which the codicil executed to-day, depriving him of a cash legacy of £2500, will to some extent remedy." Then at the conclusion of it he says this: "I am willing to accept the cancelled legacy in full of all my demands, and my partners can easily arrange between themselves the payment of this money after my death."

Now, my Lords, the tone of mind, the arguing with oneself that one sees there, is not, I think, very inconsistent with one's knowledge of human nature. Mr. Michael King knew that he was under an obligation, and when he takes away the legacy which he was bound to leave he is arguing with himself that he himself in his estate has been injured to the extent he supposes, and he says: "I am willing to accept this cancelled legacy instead. I have no other mode of recouping myself than by making this disposition." My Lords, can anybody gravely suppose that that is the language of a man who feels he has a right to freedom of disposition, or, to use the language of the learned counsel, who is completely master of his own actions, when he argues with himself as to what he will do with that which, in the event supposed, was his own? It seems to me that you have here a coherent and consistent body of evidence which is only reconcilable with one view of the facts, and to my mind

that coherent and consistent body of evidence establishes beyond all doubt that there was an arrangement (I use deliberately that phrase) made between the brothers as to their testamentary dispositions. What that arrangement was is sufficiently described under the hand of Mr. Michael King himself. Therefore, it seems to me that the elements of uncertainty and doubt as to the fact which certainly weigh very strongly against any nuncupative will do not apply here. The person against whose estate this claim is made has under his own hands stated what the arrangement was. If that arrangement, being such as he states, operated upon the testamentary disposition of his brother, whether it was by his brother's retaining the will, which he had already made or by his making a new disposition, is immaterial. The fact is that it remained, and it had the effect of sending the property in the direction intended in pursuance of this arrangement. The result is to my mind absolutely plain that the arrangement is established by clear and definite evidence, and therefore the judgment of the majority of the Court of Appeal in Ireland ought to be reversed, and I move your Lordships accordingly.

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LORD SHANL :—

My Lords, it would, I think, serve no useful object to go again over the details involved in the examination of the numerous testamentary writings and other documents referred to in the judgments of the Master of the Rolls, the learned Chancellor, and the learned Judges of the Court of Appeal in Ireland. Two views of the case may be taken with reference to those details—the view presented by the Master of the Rolls, and the view presented by Lord Justice Fitz Gibbon respectively. I agree in thinking that the evidence under the hand of the late Mr. Michael King supports the first judgment. While I have felt throughout that the case is attended with great difficulty, I concur in the view which the noble and learned Lord on the woolsack has now expressed, that the judgment of the Court of Appeal should be reversed, and that of the Master of the Rolls restored. My verdict upon the disputed question of fact as to the existence of an arrangement, which I call a contract, is in favour of the plaintiff.

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LORD DAVEY :—

My Lords, I am of the same opinion, and I so entirely agree with what has been said by my noble and learned friend on the woolsack, that I should not add anything of my own were it not that we are differing from two learned Judges who are entitled to our highest respect, and one likes to show that one has formed an independent opinion of one's own.

My Lords, with regard to the law on this subject, there is no question whatever on either side of the Bar. It is now well established, and has been settled since the time of Lord Hardwicke, that if a testator communicates in his lifetime to a proposed devisee or legatee that he has left him his property, and expresses a wish that the property should be disposed of in a particular manner, and the legatee or devisee by acquiescence, or even by silence, accepts that communication, and the testator dies without any repudiation, a trust is fastened upon his conscience, as it is said, and he cannot afterwards either appropriate the property to his own use or dispose of it otherwise than in accordance with the wishes which were thus communicated to him, and which he has accepted.

My Lords, it is said that this jurisdiction is based upon fraud, and so it is, because if you once get to this, that it is a trust which is imposed upon the conscience of the legatee, then if the legatee betrays the confidence in reliance upon which the bequest was made to him, then it is what I should think everybody would consider a fraud, though I take the liberty to say that the moral turpitude of any particular case must vary infinitely according to the circumstances of the particular case. My Lords, the basis of it is of course that the testator has died, leaving the property by his will in a particular manner on the faith and in reliance upon an express or implied promise by the legatee to fulfil his wishes, and your Lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think, by Vice-Chancellor Turner in one of the cases which were cited, the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise, express or implied, made by the legatee to fulfil his wishes.

My Lords, having said this much, I turn now to the facts which are proved in the present case. The evidence consists, as my noble and learned friend on the woolsack has pointed out, of three documents and of the oral evidence of Miss Macartney. Now I think it is important to look at the circumstances under which the first document, the draft codicil, was made by Mr. Michael King. We have not, I think, the date when the draft codicil was made, but it must have been shortly before the death of Mr. John King. What is the language of it? "In the event of my surviving my brother, and of my becoming entitled thereto as his devisee and legatee, I devise and bequeath the three houses in the main street, Limavady, the part of the glebe of Fahan so purchased by my brother, the sums of £800 and £100, making together £900, being the half of the mortgages of Bernard Sweeny and Thomas Smith, and the sum of £1000, secured on the property of Colonel Lyle, to my nephew, John Alexander French, absolutely." Your Lordships, observe that that is made in contemplation of the testator becoming the legatee and devisee of his brother. He then goes on: "I make this codicil in pursuance of an arrangement with my brother, that the property and money the subject of this codicil should go to his namesake, John French, along with my father's residence, and that mine should go, as stated in my will, to my namesake, Michael King." Then come these words which are of capital importance: "Should my brother survive me he will make a new will carrying out the provisions of this codicil." Now, my Lords, I ask what is the plain meaning of these words? They point to some communications between the two brothers, because he speaks of an "arrangement," and of course it takes two parties to make an arrangement. In the next place he contemplates the chances of life, and he says, My brother may survive me, in which case this will cannot take effect, but in that case he will—that is to say he has communicated to me his intention of doing so—make a new will to carry out his testamentary dispositions, but in the meantime (this is how I paraphrase it, he leaves it to me as his legatee and devisee under his existing will to carry out those intentions, which if he survives me he will carry out himself by making a new will.

My Lords, I confess in those cases which I have had a certain

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familiarity with in the course of my practice in the Court of Chancery I have seldom or never seen a more complete avowal and admission by a person whose estate was sought to be charged of the condition under which he acquired the property than is contained in that draft codicil, even if that stood alone. And I will venture further to observe that, as I understand the law, it is not necessary to make out that the arrangement amounted to a contract, it is sufficient, as I have already said, if there be communication and acquiescence in the testator's lifetime. That, I think, is the answer to the argument which was pressed upon us by Mr. Haldane and his learned junior; that this deprived Mr. Michael King of all power of disposition over his own property. My Lords, I do not think that was the necessary effect—at all events that is what the Court is asked to say, but if, as I think, there are strong grounds for saying that this amounted not merely to a communication of John King's intentions and of Michael King's agreeing to carry out those intentions, if it amounted to a contract by Michael as to the disposition of his own property, we must accept the consequences, and conclude that that was what the parties intended. But if that did amount to a contract, it appears to me that it makes the case all the stronger against this gentleman's estate.

My Lords, this codicil I gather was prepared, but not executed, shortly before Mr. John King's death. Now after Mr. John King's death what do we find? On the 15th July, 1891, Mr. John King, having died in the month of June of that year, we find Mr. Michael King writing this letter, on which the plaintiff relies. It is true it appears not to have been sent to Mrs. French; he may have changed his mind, and thought it would be better not to reveal what had taken place between himself and his brother, but here he put on record and kept among his documents this letter which is in all respects complete although it is not signed. He says: "I have left John French my father's farm and residence, and a full equivalent for the money and property to which I succeeded on my brother's death, it being arranged between us that his property was to go to Johnny and mine to William." Well, my Lords, that is again a sentence which is perfectly clear and unambiguous, and in my opinion it admits, as it does in your

Lordships' minds, only of one interpretation. It does not carry it further than the draft codicil does, but the importance of it is that it is written immediately after—within a month I think after—the death of John King, and therefore it shows that the arrangement was a subsisting arrangement up to the death of that gentleman.

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My Lords, I own that I attach quite as much importance as my noble and learned friend does to the evidence of Miss Macartney. That lady's credibility and respectability were unimpeached, and there certainly were no grounds for impeaching them, and if you look at the cross-examination you will see that it was not even attempted to test the accuracy of her memory. Of course she might be perfectly honest and yet her memory might be at fault, but she is only a little doubtful as to the exact date at which this conversation took place except that it was after John King's death. There was no attempt to test her memory as to the accuracy of the words that she had repeated in her examination in chief. I therefore take them to be what she intended to say and what we must take as undisputed evidence. "He" (that is Mr. Michael King) "said that Mr. John King had said that he would take care of John if Mr. Michael King would take care of William." My Lords, that is a very good layman's way of stating a contract. "He told me that that was what Mr. John King had said to him." My Lords, I think that is evidence of very considerable importance in confirmation of the documents which are put in as admissions by Mr. Michael King himself.

Then, my Lords, the third document I shall not say much upon. It explains very clearly how it was that Michael King came to depart from this arrangement which he had obviously intended to carry out up to that time. It appears that he had entered into partnership as a solicitor, or rather I should say he had admitted John Alexander French as a partner with himself in the lucrative business he was carrying on at Londonderry or near to Londonderry. He appears afterwards to have been dissatisfied, and to have thought that his partners had treated him (if I may use a vernacular expression) in a rather shabby manner. It was not that they had not fulfilled any engagements they had undertaken, but apparently they had not entered into

H. L. obligations which he thought he might fairly under the circumstances have asked them to undertake. He appears to have been a little sore upon the subject, and thereupon he makes a new will and writes this document contemporaneously with the new will. *FRENCH* It is of the same date; the document itself, as altered in pencil, bears date the 16th March, 1894, and the will is also dated the 16th March, 1894. He makes a new will in which he revokes one of the gifts which he had made in his previous will in pursuance of this arrangement, and then (I need not continue the story) in a subsequent codicil he revokes another gift, the dissatisfaction as to John Alexander French as his partner appearing to have continued and, perhaps, to have increased. My Lords, I entirely agree with what my noble and learned friend has said as to the effect, when you know the facts, of the very curious sentence which is to be found in that memorandum with reference to accepting the legacy as compensation for the money which he conceived he had been unfairly called upon to pay. It is a remarkable fact that a man should leave on record such a document at all explaining testamentary provisions which he had a right to make and a right to revoke, but it is certainly much more remarkable when he feels bound to explain them in an apologetic tone, and to use such a very remarkable expression as that which the Lord Chancellor has quoted.

My Lords, I have only further to say that I think the two learned Judges in the Court of Appeal, who took a different view from that which I have been expressing to your Lordships, base their opinion rather upon this, that the admissions were in themselves, as they thought, ambiguous documents and capable of explanation, and that the subsequent conduct of Mr. Michael King and the high character which he bore, and, so far as one can tell, justly bore, amongst his business and private friends, rebutted the charge of fraud which they thought was at the basis of this doctrine. My Lords, that seems to me an argument in a circle. It seems to me to be putting, if again I may use a vernacular expression, the cart before the horse. If the true effect of this undisputed evidence be what I have said, then it is in the eye of the law, no doubt, a fraud, and it is no answer to say that the gentleman bore a high character which rebuts that charge of fraud; and the

argument that his subsequent conduct manifested a belief that he was not bound by any such arrangement, is of course merely saying over again in another form that his conduct amounted to a breach of it. My Lords, I feel bound to say that although, undoubtedly, there is the highest authority in this House for saying that the doctrine is founded on what is in the eye of the law fraud, the moral turpitude of that charge may, as I have already said, differ infinitely in different cases. In the case of this gentleman it is perfectly clear from the documents which are upon your Lordships' table that he, rightly or wrongly, conceived himself to be aggrieved by his partners, and, having regard to the position both of age and relationship in which he stood to John Alexander French, he may have conceived, unjustly as it appears to me, that John Alexander French had behaved in such a manner towards him that he was justified in revoking his testamentary dispositions, in fact, that the circumstances were so altered that probably his brother John would, if he had been alive, have requested him to do so.

My Lords, there is only one other point which I omitted to mention in its order. Reliance is placed upon the letter from this gentleman to Mr. John Alexander French in which he uses words to this effect: "unless I change my intention you will become entitled." He had not thought it necessary, and did not think it necessary, apparently, to inform John Alexander French of the arrangement which had been made between himself and his brother, and it was perfectly natural, therefore, as John Alexander French would derive such benefits as he was to enjoy from the testamentary disposition of Michael himself, that in corresponding with him he should prefer to put it on his own intention rather than on the arrangement which had been made with his brother John.

My Lords, on these grounds I agree with your Lordships that the appeal should be allowed.

LORD BRAMPTON:—

My Lords, I have very few words to add to my expression of concurrence in the judgment proposed by the Lord Chancellor.

There seems to be no difference of opinion as to the law

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affecting this case. The only difference of opinion has arisen as to whether the inference to be drawn from undisputed facts before us supports the appellant's claim, that Michael King held the property he acquired under his brother, John King's will, subject to the "arrangement" alleged to have been made by the two brothers under circumstances which rendered the disposal of that property otherwise than in accordance with that "arrangement" inequitable and unjust.

I entertain no doubt upon the subject, and, without looking to the confirmatory evidence of the trust relied on, I should be content to support my opinion by the statements written by Michael King, by his own hand, in the draft codicil to his will, on the 2nd May, 1891, not quite three months before the death of his brother John, and in the unsigned and undischpatched letter of the 15th July, 1891, to Mrs. French, beginning, "My dear Fanny." Both these documents afford to my mind the strongest evidence not only of the existence of the arrangement but of the substance of it; while the letter affords cogent evidence that there was no revocation of or alteration in it during John King's lifetime. Unless that arrangement had existence it is impossible to believe that Michael King, a shrewd lawyer, would have penned these statements, which indicate to me that he felt the obligation imposed upon him as a trust which he was bound to fulfil, and which he knowingly and deliberately omitted to observe.

There are many surrounding circumstances which seem to me to point to the probability of the appellant's case. I will not, however, discuss them in detail, for this has already been done, and it is unnecessary to do so again. I will content myself with the expression of my opinion that this appeal ought to be allowed, and the judgment of the Master of the Rolls restored.

LORD ROBERTSON :—

My Lords, Mr. Jellett's examination of the evidence has been so close and complete that I am satisfied that no material element is absent from our understanding of this case. I have steadily kept in view that in order to the appellant's success we must have clear and distinct evidence that John King left the property in

dispute to Michael King upon an undertaking by Michael that he would leave it to the appellant.

The evidence is not copious, but it is for the most part of high quality, viz. the written statements of Michael himself. If there had been but one such document, or the terms of the admission were ambiguous, there would be room for hesitation. It might be that circumstances existed, which are unknown to us, that might furnish an explanation. But when we find that the same statement is made by Michael on entirely different occasions, and that the thing said to have occurred is in each instance stated in plain language, the difficulty of getting over those statements increases, in my mind, up to the point of being insuperable. The ingenious suggestion that the two statements differ has, in my judgment, been entirely displaced by a closer examination of the amount of the mortgages. Before John King's death the statement is made, and after his death it is repeated. I regard this latter statement as having this special importance: that it puts on record that John had died with this arrangement still standing and forming the basis of his testamentary dispositions. Once this is recorded by Michael, I find it out of my power to refine over the word "arrangement." Leave blank the space which is filled by the word "arrangement" and you have described the doing of one thing by one man in consideration of the other man doing something else, the two things being on the face of them correlative and reciprocal. Between two living men any such arrangement had this element of indefiniteness, that it might at any moment be done away with. But the unsigned letter of the 15th July, 1891, amounts to a summing up by Michael of John's final disposal of his estate, and describes it as an ultimate bequest to the appellant. And, in this light, I cannot say that the mere fact that John's will had already been made before the arrangement introduces any serious difficulty in the way of the appellant.

Now, as already suggested, there might, if there were but one written acknowledgement of this kind, be some possible oblique motive for writing down something else than the fact. But none such is forthcoming, and when, at one time, in the draft of the

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will, and later on in a letter purporting to be addressed to a relation deeply interested in these affairs, the same statement is made, I am in need of some reason against the inevitable inference being drawn that that statement was true. Nor, in a matter of this kind are these documents of the less significance, because the draft will was ultimately superseded, and the letter was ultimately not sent.

But, further, I cannot find in any of the remaining facts anything materially inconsistent with the appellant's case. On the theory of the written statements it was quite natural that Michael should deal with John's estate (as for example in accounting to the Revenue) as his own, and should purport to bequeath the property to the appellant on the same footing. The absence from the will of an express avowal of the arrangement is not inconsistent with the arrangement so long as the thing done was that which had been arranged. The same remark applies to the letters of 3rd January, 30th March, and 12th April, 1891, with this added force, that they were written before the arrangement had become effective by the death of John.

Now the will of Michael, which was executed about three months after John's death, completely effectuated the arrangement, and it stood as Michael's testamentary disposition for more than two years, until 2nd December, 1893, when the first of a series of testamentary writings was made which diverted John's estate from the appellant. I do not neglect the criticisms of Mr. Jellett on the difference between the bequest of £2500 in the will and the description of the arrangement given in the codicil. But the explanation of this variance is given in the letter of 15th July, 1891, and seems to confirm the appellant's contention. The explanation of Michael's change of mind is again recorded under the hand of Michael; and without dwelling upon it or repeating what has been already said so forcibly, I consider it to afford, in a most singular way, strong corroboration of the appellant's case. It leaves in my mind no doubt that there had been this arrangement, and that it was broken merely because, not without difficulty, Michael brought himself to believe that substantial retribution could only be done by his setting the arrangement aside with his

own hand. This was an act not to be justified, and against which redress is demanded and effectively provided; but anyone who has read these papers can understand the subtle processes of self-deception by which a man of otherwise unblemished character might whittle away the obligation under which he lay to a dead brother, and substitute for it some conjecture of what the brother would have done had he been alive.

I have only to add that the evidence of Miss Macartney has this special importance: that it furnishes evidence of a *viva voce* statement to exactly the same effect as those made by Michael in writing and when alone.

Fortified by this chain of evidence, I am definitely of opinion that the appellant has made out his case (1).

Solicitor for the plaintiff: *C. S. Caldwell.*

Solicitors for the defendants: *Hone & Falkner.*

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(1) The report of the judgments in the House of Lords has been printed from the notes kindly supplied by Mr. Moorsom, K.C.

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Feb. 7, 10,
11.

(1901. No. 44.)

Practice—Trial—Trial by jury—Composite action—Issues of fact—Claim for unliquidated damages—Action for account and fraudulent conspiracy.

An action having been brought in the Chancery Division against C. W. S. for damages for negligence as agent for the plaintiff in the purchase of horses, for fraudulent representation and conspiracy, and also for an account of all profits made by him as such agent, and against five other defendants for damages for conspiracy and an account of all profits made by them, the defendants unsuccessfully applied to transfer the case to the King's Bench Division. The pleadings closed on the 14th June, 1901. On the 11th December, 1901, the defendants served notice of trial before the Vice-Chancellor with a jury, but the officer of the Court refused to set the action down. On the 14th December, 1901, the plaintiff served notice of trial by the Vice-Chancellor. The defendants applied for an order to set aside the plaintiff's notice of trial as irregular, and that the action should be set down for trial on the defendants' notice, or that the action, or the issues of fact, should be tried by a jury. On appeal from an order of the Vice-Chancellor refusing the application, the plaintiff undertook to strike out the claim against C. W. S. for negligence, and the claim for unliquidated damages:—

Held, that the action thus altered was a Chancery action which should be tried by a judge without a jury. The law and practice as to the right of trial by jury under the Judicature Act considered.

ACTION by the Secretary of State for War against Charles Washington Studdert, John A. Studdert, Thomas Studdert, Wilfred Fletcher, J. W. Gregg, and John Widger, and the endorsement on the writ stated the cause of action against Charles W. Studdert, as purchasing agent of the Government, as for—

1. Damages for fraudulent breach of duty in inducing Her Majesty's Government, through the Imperial Yeomanry Committee of the War Department, to make excessive payments for a large number of horses purchased by him as such agent, by falsely and fraudulently misrepresenting to the said Committee

the names of the persons from whom, and the prices for which, the said horses had been purchased.

2. Damages for false and fraudulent misrepresentations that he had purchased large numbers of said horses for prices largely in excess of the sums which were paid for same.

3. Damages for negligent conduct as such agent in examining and purchasing for the public service horses which were wholly unfit for the purposes for which, to his knowledge, they were required.

4. An account of all profits made by the said defendant in the course of his said employment as such agent, and in relation to his inspection, examination, and purchase of horses for the said War Department.

The plaintiff claimed against all the defendants and each of them:—

5. Damages for that they conspired and combined together to defraud Her Majesty's Government, through the said War Department, by aiding and assisting in the fraudulent breach of duty and wrongful acts of the defendant, Charles Washington Studdert, above mentioned, and

6. Damages for that they conspired and combined together to procure large and excessive payments from the said War Department, through the Imperial Yeomanry Committee, by falsely and fraudulently representing that large numbers of horses had been purchased through the agency of the said Charles Washington Studdert from persons from whom they were not purchased, and for prices largely in excess of the prices actually paid for same, and

7. Damages for that the defendants conspired and combined together to obtain from Her Majesty's Government, through the said War Department, large sums of money by falsely and fraudulently pretending that a large number of horses supplied to the Government had been purchased by the defendant, Charles Washington Studdert, at a price of £30 for each horse, whereas, in fact, said horses had been purchased at prices much less than £30, the defendants, or some of them, agreeing with the defendant, Charles Washington Studdert, to divide the differences between them in certain proportions.

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- Appeal.* 8. An account of all secret profits made by the defendants,
 1902. and each of them, by reason of such corrupt and fraudulent
 WAR agreement and conspiracy.
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 v. 9. Discovery.
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By Royal Warrant, dated the 24th December, 1899, Queen Victoria authorized the formation of a corps to be entitled "The Imperial Yeomanry," and by instructions of the plaintiff, issued under the authority of the Army Act, it was directed that the Imperial Yeomanry should be administered by a committee consisting of seven members. One of these, Colonel St. Quintin, was appointed to superintend the re-mounts.

Colonel St. Quintin had acted previously in the purchase of horses for the War Department, and had purchased large numbers of horses in Ireland, in the course of which business he became acquainted with the defendant, C. W. Studdert. C. W. Studdert was a land agent in Co. Clare, and was assisted in business by, or in partnership with, his son John A. Studdert, the defendant.

The defendant, Thomas Studdert, was a son of C. W. Studdert, who resided at Athboy, in the county of Meath, where he carried on the business of a dealer in horses in partnership with the defendant, Wilfred Fletcher. The defendant, Gregg, was a son-in-law of C. W. Studdert, who resided near Athboy, in the county of Meath, and Widger was a horse-dealer at Waterford.

On the 8th January, 1900, Colonel St. Quintin telegraphed to C. W. Studdert—"Will you do me a favour: go and inspect horses—Waterford and Dublin—for me. Will give you £2 a-day and expenses. You can arrange for your own Vet. Reply at once, and whether ready to go to Waterford to-morrow." The defendant telegraphed, in reply, that he would go. Between the 9th January and the 16th February, 1900, the defendant, C. W. Studdert, purchased 354 horses at the price of £35, and on the 16th February Colonel St. Quintin wrote that he was prepared to buy some more horses in Ireland, but he would not pay more than £30 apiece for them, and advising C. W. Studdert to deal exclusively with Widger of Waterford and Meleady of Dublin, and that it was no use buying all over the country and putting up the price. Some further letters and telegrams passed between

the plaintiff and C. W. Studdert, and then the statement of claim averred that it was fraudulently agreed between C. W. Studdert and the other defendants (except Widger) that John A. Studdert, Thomas Studdert, and J. W. Gregg should purchase horses of an inferior class as regards quality, strength, and condition at prices much below the sum of £30 for each horse, and that the horses so purchased should be returned by the defendant, C. W. Studdert, as having been purchased by him for £30 each, and that such horses should be passed by C. W. Studdert as suitable and proper.

Down to the 29th March, 1900, 1001 horses were purchased, for each of which £30 was charged, and in the returns furnished by C. W. Studdert the following purchases were (amongst others) set forth:—Patrick Collins, Corofin, Co. Clare, 124 horses at £30; W. Fletcher, Grennanstown, Athboy, 142 horses at £30; J. W. Gregg, Caucestown, Athboy, 57 horses at £30.

The statement of claim averred that Collins was a clerk in the Land Agency Office of C. W. Studdert; that the 124 horses were not brought from him; that they were bought by C. W. Studdert and John A. Studdert, and were returned as having been purchased by Collins to avoid suspicion; that the horses were deficient in quality, strength, and condition; and that the profits of these sales were shared by C. W. Studdert and John A. Studdert.

The 142 horses, stated to have been purchased from Fletcher, were bought at prices much less than £30, and were inferior and unfit, and that the profits were divided between Fletcher, C. W. Studdert, and Thomas Studdert.

The 57 horses purchased from Gregg were horses purchased by Gregg at prices much below the maximum price, and were deficient in quality and unfit, and that the profits of this part of the transaction were divided between C. W. Studdert and Gregg.

Paragraph 41 of the statement of claim stated that C. W. Studdert was guilty of negligent conduct, as such purchasing agent, in his examination of, and in passing and purchasing for the public service, a large number of horses which in quality, strength, and condition were unfit for the purposes for which, to the knowledge of the defendants, they were required.

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The prayer of the statement of claim was for: 1. Damages ; 2. Accounts of all the profits, rebates, and commissions received by the defendants, and each of them, in the purchase and sale to the Imperial Yeomanry Committee of the horses thereinbefore mentioned ; 3. Discovery ; 4. Further relief.

The defendants by their defences traversed the averments in the statement of claim. On the 11th March, 1901, the defendants moved to transfer the action to the King's Bench Division, and the Vice-Chancellor acceded to the application. His Lordship's order was reversed on appeal (1). The pleadings were closed on the 14th June, 1901. The action was discontinued against Widger. On the 11th December, 1901, the defendants served notice of trial of the action before the Vice-Chancellor with a jury, but the officer of the Court refused to set the action down. On the 14th December, 1901, the plaintiff served notice of trial before the Vice-Chancellor. The defendants then applied for an order that the plaintiff's notice of trial be set aside as irregular on the ground that the same was served after notice of trial given by defendants, and within six days thereafter, and while such last-mentioned notice of trial was in full force, and that the proper officer should forthwith set down the action for trial on the defendants' notice of trial ; or, without prejudice to the defendants' notice of trial, that the action should be tried before the Vice-Chancellor and a special jury of the city of Dublin on the questions or issues of fact in this action by such special jury.

On the 13th January, 1902, the Vice-Chancellor refused the motion, and the defendants appealed.

Ronan, K.C., O'Shaughnessy, K.C., Jellett, K.C., McCarthy Mahony, and Phelps, for the appellants:—

This action is a mixed action, part of it involving the decision of issues of fact which the defendants are entitled to have tried by a jury, and part of it being a question of law. Once the plaintiff omitted to serve notice of trial within six weeks after the close of the pleadings the defendants became entitled to serve notice of trial: Order XXXVI., Rule 11. We submit that our notice of

(1) See the case reported [1901] 1 I. R. 346.

trial was regular, and that the officer ought to have set the action down on our notice of trial. Once there was a notice of trial regularly served, the plaintiff had no right to serve another, and his notice is irregular. The plaintiff could, if he had chosen, have served notice on the defendants, withdrawing the common law portion of the action, and reduced the action to an equitable one simply, as was done in *Hinds v. Blacker* (1); but he has not done so, and has served notice of trial of this composite action by the Judge without a jury. That is a violation of section 48 of the Irish Judicature Act. The nature of the action depends on the relief claimed. The test is—Is there a cause of action for which relief is claimed which could only have been given by a common law Court? Paragraph 41 of the statement of claim is a count for negligence, and the plaintiff claims damages for negligence, fraud, and conspiracy. Before the Judicature Act there was no right to bring an action for unliquidated damages in the Chancery Division except Lord Cairns' Act applied, and this action is not within Lord Cairns' Act: *Betts v. Neilson* (2); *Clanricarde v. Ryder* (3). Section 48 of the Irish Judicature Act enacts that "Nothing in this Act, or in any rule made under its provisions, shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right have so required." These words do not occur in the English Act, and the English cases are, for the most part, distinguishable. Here the plaintiff has claimed common law relief, and the defendant is entitled to have the damages assessed by a jury. The defendant is entitled to take the plaintiff's action as he finds it; but the plaintiff cannot, by tacking on an equitable claim, deprive the defendant of his right to trial by jury. *Gardner v. Jay* (4) and *Lynch v. M'Donald* (5) are distinguishable: *Gardner v. Jay* (4) was an action for breach of trust to which there was joined a count for detinue, and the Court held that the action was to be tried by the Court, unless the parties could show it was better to have it otherwise, which they failed to do. *Lynch v. M'Donald* (5) was an action to redeem shares in a company which had been pledged, the

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(1) I. R. 11 Eq. 322; 1 L. R. Ir.
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(3) [1898] 1 I. R. 98.

(4) 29 Ch. D. 50.

(2) L. R. 3 Ch. 429, 440.

(5) 37 Ch. D. 227.

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defendants counterclaimed for fraudulent misrepresentation, and the Court refused trial by jury. In the case of a mixed action, under the rules in England, though a party may not be entitled to a jury as of right, yet if the Court is of opinion that it would be more satisfactory it will order trial by jury: *The Temple Bar* (1); *Coote v. Ingram* (2); *Timson v. Wilson* (3); *Jenkins v. Bushby* (4).

There is no procedure in Ireland by which a party can insist on his legal relief except by serving notice of trial: *Powell v. Williams* (5); *Coles v. Civil Service Supply Association* (6).

All that the Court determined on the former appeal in this case was that the action should be retained in the Vice-Chancellor's Court, and should be determined according to law. This is on the main points an action for unliquidated damages:—(1) for negligence; (2) for fraudulent misrepresentation; and (3) for conspiracy. Where the liability and also the amount of damages is disputed in an action, and the question of the amount of damages is so involved, the Court will not try the question of liability till the amount of damages is ascertained: *Smith v. Hargrove* (7).

The Solicitor-General (Campbell, K.C.), Matheson, K.C., and Morphy, for the plaintiff:—

Section 36 of the Judicature Act describes the business to be assigned to the Chancery Divisions and Common Law Divisions. By section 37 the plaintiff may assign his action to such Division as he thinks fit, and once he has done so, subject to the power of the Court to transfer the action or to direct issues of fact to be tried, it remains in that Division. In the former appeal this Court decided that this action should not be transferred. This is essentially a Chancery action, with the exception of paragraph 41—the count for negligence—which we consent to strike out. Section 42 applies the provisions of the Chancery Amendment Act, 1858, and the Chancery Regulation Act, 1862, as to assessment of damages and trial of questions of fact, to the Chancery Division.

(1) 11 P. D. 6.

(2) 35 Ch. D. 117.

(3) 38 Ch. D. 72.

(4) [1891] 1 Ch. 484.

(5) 12 Ch. D. 234.

(6) 32 W. R. 407.

(7) 16 Q. B. D. 183.

This is an action for an account against C. W. Studdert as agent, and for damages for breach of his duty as such against him, and against the other defendants as his accomplices. If the whole dispute between the parties can be better tried in the Chancery Division, it will not be transferred to a Common Law Division: *Hillman v. Mayhew* (1); *Holloway v. York* (2); *Holmes v. Harvey* (3); *Boyd v. Phelan* (4).

As to the mode of trial, we say there was no right to a trial by jury of an action such as this before the Judicature Act. The Court will regard the general scope and nature of the action; and we submit that this is not an action of conspiracy, but an action against one defendant for breach of trust, and against the others for helping him. A Judge of the Chancery Division cannot try a case with a jury: *Clarke v. Cookson* (5); *Warner v. Murdoch* (6). In England, Order XXXVI., Rule 26, of the Rules of 1875, gave the Court a discretion in all cases, which before the Judicature Act were properly within the jurisdiction of the Court of Chancery to order them to be tried without a jury; and the Court would not allow a jury at the instance of one defendant: *Back v. Hay* (7); *Pilley v. Bayl'* (8); *Bordier v. Burrell* (9). The only change made by the Rules of 1883 is that the *onus* is shifted, and the *onus* is now on the person requiring a jury: *Walsh v. Ryan* (10); *Garling v. Royds* (11); *Ruston v. Tobin* (12); *Spratt's Patent v. Ward* (13); *Wedderburn v. Pickering* (14); *Gardner v. Jay* (15); *Lynch v. Mc'Donald* (16). When a person is charged with committing a fraud or breach of trust, others who have combined with him may be sued in equity as co-defendants: *East India Company v. Henchman* (17). When charges amounting to criminal charges are made by the statement of claim, the Court will refuse to send issues to be tried by a jury when the real question to be

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(1) 1 Ex. Div. 132.

(2) 2 Ex. Div. 333.

(3) 35 L. T. (N. S.) 600.

(4) 17 L. R. Ir. 538.

(5) 2 Ch. D. 746.

(6) 4 Ch. D. 750.

(7) 5 Ch. D. 235.

(8) *Ibid.* 241.

(9) *Ibid.* 512.

(10) [1895] 1 L. R. 504.

(11) 25 W. R. 123.

(12) 10 Ch. D. 558.

(13) 11 Ch. D. 240.

(14) 13 Ch. D. 769.

(15) 29 Ch. D. 50.

(16) 37 Ch. D. 227.

(17) 1 Ves. Jun. 287.

Appeal. tried in the action is a matter properly within the cognizance of
 1902. a Court of Equity : *Ehrmann v. Ehrmann* (1).

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FITZ GIBBON, L.J. :—

Feb. 11. The simplification by the plaintiffs of the pleadings, by getting rid of the cause of action for negligence against the defendant C. W. Studdert alone, and of the claim for unliquidated damages, on which the defendants mainly relied, does not relieve us from the duty of considering the law as to the right to trial by jury in civil actions in Ireland, because Mr. Ronan has pointed out that the appeal cannot be dismissed, unless there is in existence a notice of trial which was good when it was served. The plaintiffs notice, if illegal when served, cannot have become good by anything subsequently done. If the defendants notice was valid and regular when it was served, they cannot be deprived of a trial according to its terms, but if their notice is bad, the plaintiffs subsequent notice cannot be worse than if it had been served first, and before the plaintiffs lapsed their time.

I do not intend to treat the question as a special demurrer on the particular shape or terms of the notice or document on which it is raised. What is the nature of the action? We must deal with it as it stood when the defendants served their notice of trial. The writ is first divided into two parts, namely—(1) an action against Charles W. Studdert, and (2) an action against the other defendants. Then the action against Charles W. Studdert is sub-divided into two parts, one of which is wholly inapplicable to the other defendants. C. W. Studdert is sued as a “purchasing agent of the Government” for (1) Damages for fraudulent breach of duty in inducing Government to make excessive payments for horses purchased by him as such agent by falsely and fraudulently misrepresenting the names of the persons from whom and the prices for which the said horses had been purchased; (2) Damages for like misrepresentations that he had purchased horses for prices in excess of the sums paid for them; (3) Damages for negligent conduct as such agent in the purchase of the horses he bought for Government; (4) An account of the profits made by the defendant

(1) 72 L. T. (N. S.) 548.

in the course of his employment as such agent, and in the examination and purchase of horses for the War Department.

The claim against the other defendants follows in four paragraphs, similar to the claim against Charles W. Studdert, except that paragraph 3, for negligence, is omitted, and that instead of being sued as "agents," they are sued for damages for conspiring and combining to defraud Government by aiding and assisting the wrongful acts of C. W. Studdert on an agreement to divide the proceeds with him. In addition to damages, an account is claimed of all secret profits made by the defendants, and each of them, by reason of the fraudulent conspiracy.

The action against Charles W. Studdert for negligence could not lie against any of the other defendants, no duty or character being ascribed to them which would make any of them liable for negligence. Furthermore, the only relief which the law could give against Charles W. Studdert for the alleged negligence is unliquidated damages. Though the other paragraphs begin with "damages," an account of profits is claimed both against Charles W. Studdert and the others in respect of all these other causes of action. Omitting the count for negligence, sounding in damages which must be unliquidated and could not be the subject of "account," the rest of the action against all the defendants, if the combination is proved, is really the same, because it is as old as 1 Ves. Jun. that if a servant defrauds his master, anyone who knowingly helps him to do so is equally liable to the master. This is the ground of liability alleged, but two forms of relief are claimed, and, as I read the writ, it would be open to the plaintiffs, as it stands, to claim damages liquidated or unliquidated, or to claim restitution of the money obtained by the fraud, and an account of the fraudulent profits.

I think it clear that before the Judicature Act the Court of Chancery had no jurisdiction to try an action of negligence in which the only possible relief was unliquidated damages. Furthermore, it had no jurisdiction or machinery to ascertain or assess unliquidated damages in any case, save as alternative or ancillary relief under Cairns' Act.

There were many cases where a person injured by a fraud could take his choice, and sue either in Chancery for an account

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and restitution, or at common law for unliquidated damages and compensation. But before the Judicature Act, if he went for unliquidated damages, the only tribunal which had jurisdiction to assess them was a Common Law Court with a jury. On the other hand the only Court which could give an account or restitution was Chancery.

There was one apparent exception—where dealings were so complicated that the unravelling of intricate accounts was necessary to ascertain legal rights, the old authorities recognize the power of Chancery to take an account of disputed legal demands.

The statement of claim in this case follows the writ, and is quite as explicit in claiming damages for negligence against Charles W. Studdert alone. This distinct cause of action is contained in paragraph 41. All the rest deals with the alleged liability of Charles W. Studdert for defrauding the Government as agent, and of the other defendants for fraudulently helping him. Relief is prayed under four heads—(1) damages; (2) accounts of the profits, rebates, and commissions received by the defendants, and each of them; (3) discovery; and (4) further relief. The last two are only ancillary.

On that statement of claim unliquidated damages might be recovered upon all the causes of action against all the defendants. It states one cause of action, against C. W. Studdert alone, upon which nothing but unliquidated damages could be recovered. As to everything else, and as to all the defendants, it states a cause of action, good at common law, sounding in unliquidated damages, if the plaintiffs elect to claim them; but it also states facts entitling the plaintiffs, on that same cause of action, to relief which the Court of Chancery alone could give, viz. an account and restitution.

The case has now come here for the second time, but I must say that we have honestly tried to consider it as if we had never heard of it before. On the former occasion an order had been made to transfer the action to the King's Bench, which we reversed. In form the question then was whether the action should go to the King's Bench or remain in the Chancery Division; but the real point at issue was whether the action, as a whole, was to be tried

by a jury, and we decided that it was not: otherwise we should have left it in the King's Bench. If we allowed the present appeal, it might make our previous decision look foolish, but if the appeal is right in law we cannot help that. The right to a jury was not discussed on the former appeal as it has been now. I pointed out that, notwithstanding our decision, there might still be a jury at the trial, or certain issues might be tried by a jury; but such a jury would not be of right; it could be got only under the discretionary power vested in the Chancery Division.

Though attention was called to the general character of the action, and we held that, as a whole, it was within the Chancery jurisdiction, we did not then face the question whether we were depriving the defendant of a right to a jury, as to a distinct part of the case, which he had before the Judicature Act. We must now consider it unprejudiced by our former order.

We can get little help from the English rules or decisions, because we are governed by positive law, and though the English Judges may have thought that they were following the spirit, we are bound to obey the letter of the law as to trial by jury as it stood before the Judicature Act. Our Act, by section 48, puts it out of our power—nay more, it puts it out of the power of the Act itself, or of any Rule or Order under it—"to take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right have so required, or upon any trial before a jury to have the issues for trial by jury submitted and left by the Judge to the jury, before whom the same shall come for trial with a proper and complete direction to the jury, upon the law and as to the evidence applicable to such issues." We must therefore now take care that retaining this action in the Chancery Division does not take away or *prejudice* the right to have any question of fact tried by a jury which before the Act the defendants might of right have required to be so tried. If it has that effect, it is illegal.

What would the rights of the parties have been, in respect of trial by jury, on this statement of claim before the Act? If the plaintiffs had framed a Chancery bill, praying in one paragraph for the exercise of the exclusive jurisdiction of Chancery, and in

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another paragraph praying relief which Chancery could not give, or stating a common law wrong sounding in unliquidated damages, the defendants might demur to the whole bill for multifariousness, or they might plead to the equitable part of the bill and demur to the rest for want of equity. In the result, they could expel any portion which was foreign to the jurisdiction of Chancery. Again, if the plaintiffs had brought an action at law, and had put into the declaration one of those popular narratives of supposed grievances which now stand for pleadings, even though it showed an equitable cause of action, it would have been met at law by a demurrer.

Frequently there was a middle case; the right to relief in Chancery rested on an unproved assumption of legal right; the Court of Chancery had jurisdiction to ascertain whether the legal right existed or not; but it often declined to do so, and declined to exercise its jurisdiction, until the right at law had been tried by a jury. The suit in equity in such cases stood over until the right was established at law. But in that class of cases the *jurisdiction* of Chancery was unquestioned, and the trial by jury was not "of right."

How has the Judicature Act affected the matter? Sect. 21 has transferred to the High Court the jurisdiction which, at the commencement of the Act, was vested in and capable of being exercised by *all or any* of the Courts of Common Law or Equity therein named; and sect. 25 enacts that the several jurisdictions previously existing shall cease to be exercised except by the High Court. Section 48 forbids us to make the right of trial by jury depend on the Division to which the action is assigned, because a common law action in which the right existed may now get into Chancery or may be joined with a Chancery action. Section 26 enacts that the jurisdiction transferred to the High Court shall be exercised (so far as regards procedure and practice) in the manner provided by the Act or Orders, and where no special provision is made by the Act, Rules, or Orders, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or *by any of such Courts.*

Section 27 requires the High Court in every cause to grant all remedies whatsoever to which any party is entitled in respect of any and every legal claim, so that, as far as possible, all matters in controversy may be completely and finally determined, and all multiplicity of legal proceedings avoided. There is to be no more sending a party to Common Law from Chancery, to establish a legal right before granting him equitable relief, nor any more sending him from Common Law, when he has established his right, to Equity to get his relief. He must get all his rights in and from the Division where he is. We, therefore, cannot accept as the ground of decision in the present case, nor can we accept as law any case which has laid down, that the right to a jury does not exist because the action is in the Chancery Division. The defendants must have a jury notwithstanding, if they would have had the right to it before the Act in the same action, in the Court which had jurisdiction to entertain it.

Thus the case is brought down to the only question in it, viz. Whether the action is one in which, if brought before the Judicature Act, the defendant would have had the right to have any question in it tried by a jury? The foundation of Mr. Ronan's whole argument was that the case must be within one or other of two rules. He is so far right that the rules do include every case, for they are an instance of what logicians call "Dichotomy by Contradiction." Order XXXVI., Rule 3, provides that "All causes or matters assigned by the principal Act to the Chancery Division, and all other causes or matters which the parties are not entitled as of right to have tried with a jury, shall be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order." There can be no right to a jury in any case that falls within that rule. On the other hand, Rule 4 provides that "In all causes not within the preceding Rule the party serving notice of trial shall state in such notice whether he requires that the issues of fact shall be tried with or without a jury, and in case he requires the same to be tried without a jury, the same shall be so tried, unless the other party or parties, or any of them, shall within four days from the service of ordinary notice of trial, or within such extended time as the Court or a Judge may allow, signify his desire by notice in writing to have the same tried with

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a jury whereupon *the same shall be so tried.*" In every case that falls within this Rule there must be a trial by jury, unless *neither* party so desires.

It appears to me that the answer to the attempt to put this case upon one or other of these "horns" is that the action when the notice of trial was served was one to which, as a whole, neither rule applied; it was a sort of "Siamese twins," and was two actions in one, and Rule 3 applied to part and Rule 4 applied to part, and section 48 forbade us to deprive the defendants of a jury to try the part to which Rule 4 applied—namely, the action for negligence, and the assessment of unliquidated damages, if claimed.

A cause that is half Chancery and half Common Law may be a *casus omisus*; but if so, section 48 enacts that the Act and Rules shall be so read as not to take away or prejudice the right to have any question of fact tried by a jury. But I think that this object can be attained, and that an action, though double, can be disposed of according to law under the Rules as they stand.

Order XVIII., Rule 1, provides: "Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order *separate trials* of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." Therefore, in a composite action partly triable of right by a jury and partly not, unless the whole action could be conveniently tried together with a jury, separate trials might be ordered, and there would be two notices of trial, one with a jury and the other without, and this would be the result whether the case was in the Chancery or in the King's Bench Division, and the Court would be bound to make any order that would be necessary to secure an effective trial. But this would be an unusual course, and generally an inconvenient one, and Rules 8 and 9, therefore, empower any defendant, or the Court, or any Judge, to exclude any cause of action which cannot be conveniently disposed of with any other or others.

Mr. Ronan's argument on the power to transfer the action

only transfers the difficulty, because the transfer contemplated is a transfer of *the whole action*, and the difficulty arises from the fact that the defendants right to trial by jury extended only to part of it, and to an alternative form of relief, and, for reasons fully given on the last decision, the rest of this action and the other relief prayed were not suitable for jury trial, though perhaps certain issues of fact might have been tried by a jury if an order to that effect had been made under Order XXXVI., Rule 8.

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There is nothing in the Rules as they stand to prevent the Chancery Division from giving the party any trial by jury before itself to which he is entitled. But we have to see whether the defendants notice of trial is good; unless it is irregular and bad, it is *prior in tempore potior in jure*. It is irregular and bad, because although the Act preserved the defendants existing right to a trial by jury, it did not extend that right, or give to the party who had the right to have any particular question of fact submitted to a jury, the much wider and different right to have the whole action tried by a jury, when it involved equitable rights and relief attainable only in Chancery. The defendants notice of trial applies to the whole action, and besides being unwarranted by any Rule, it is unworkable. The officer was right in refusing to set the whole action down for trial upon it. The defendants might, perhaps, have raised a difficulty if they had served a notice of trial by jury of the action for negligence and of the action for unliquidated damages; but had they done so the incompatibility of the matters at issue would have at once appeared, and the Vice-Chancellor might have either directed separate trials, or have excluded the part of the action which could not be tried without a jury, against defendants who insisted on their right to a jury.

Furthermore, it would have been the duty of the defendants to follow up their notice by obtaining the consequential directions necessary for an effective trial, and not having done so, they have served a notice which is both irregular and ineffective.

The plaintiffs notice is regular in form: curiously enough it is the very same form of notice which is given for a trial in the King's Bench Division. When that notice was served on the defendants they could have served a counter-notice under Order XXXVI., Rule 4, and required the action for negligence and the

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action for unliquidated damages to be tried with a jury; whereupon, in my clear opinion, "the same" must have been "so tried," unless the plaintiff got rid somehow of that part of the case; otherwise the plaintiff was bound to give the defendants a trial by the only tribunal that before the Judicature Act could have tried the part of the case that was not within the jurisdiction of Chancery.

That course was not adopted; Mr. Ronan's application and the plaintiffs notice was treated as perfectly right, and as effective to deprive the defendants altogether of a jury. When the difficulties were expanded here, counsel for the plaintiff offered to abandon the cause of action for negligence, and they must also elect to abandon any assessment of unliquidated damages. When these are out of the case, it is an action of which the foundation is breach of fiduciary relation by an agent, and confederacy in that breach by others. Relief is claimed—(1) in "damages," and (2) in an account of "profits" made by the alleged principal and confederates. On the former occasion I pointed out that confederates in such a case may be held liable for money fraudulently received by them, or paid by them, either as "damages" or as "money had and received." But such damages will not necessarily be unliquidated; on the contrary, I referred to cases in which Bruce, J., and the Court of Appeal in England, held that the amount fraudulently dealt with could be recovered as liquidated damages or as the very money of the plaintiff.

When the case comes to trial there will be two big questions: (1) What was the relation between Charles Studdert and the Yeomanry Committee? (2) What was the relation between him and each of the other defendants? These are questions within the cognizance of a Court of Equity, and if the fiduciary relation and the fraudulent breach of it are established, equity alone can give relief by restitution, and it alone can take an account of the unlawful gains to be refunded.

In the wilderness of decisions through which we have been wandering for the last three days the right to a jury cannot be made dependent on the Division to which the case is attached. Chancery and King's Bench must alike obey Rule 48. Mr. Ronan tried to put it on the relief prayed. That also is impossible, because the appropriate relief is now to be given in either Division,

and the principle of Cairns' Act is extended by section 42 and the Orders to every case in which the Chancery Division has to assess damages. The nature of the action and of the jurisdiction appealed to must be the criterion. If the plaintiffs' claim rests on equity, and if the relief asked can be given only in equity, it would have been a Chancery case before 1877, and there was then no "right" to a jury in Chancery. The only possible exception may have been in the case of an heir-at-law asking for an issue *devisavit vel non*. It was in the exercise of judicial discretion, not as of right, that Courts of Equity refused to decide questions within their jurisdiction until an issue of fact had first been determined at law by a jury as the foundation for equitable relief. This case was declared by us on the former occasion to be an action of which the foundation is breach of trust, and in which the relief sought is restitution and an account.

Under no circumstances can our decision now deprive any party of any right to trial by jury which he had before the Judicature Act. Our order will clear the statement of claim of every allegation which is not equitable, and the prayer from everything but equitable relief. In so doing, we are not clearing it of one shilling of money, for whatever the plaintiffs could recover at law on the ground of fraud, they can recover back in equity, as liquidated damages, or as money of the plaintiffs by way of restitution, with the single exception of any damages that might have been recovered against Charles W. Studdert alone for mere carelessness as a horse-buyer, an absolutely imaginary cause of action in the case of a man charged with fraudulent and systematic plundering. We do not strike "damages" out of the prayer, because the subject of account may be described either as liquidated damages or as money had and received as fraudulent profits, but either may be the subject of "an account." The plaintiffs can recover anything of which they can prove they were defrauded.

Accordingly, we order that the writ be amended by striking out paragraph 3 (the separate paragraph about negligence); and that the statement of claim be amended by striking out paragraph 41, and the relief must be confined to the money loss specified in paragraph 2 of the prayer of relief, and the plaintiffs must not require any assessment of unliquidated damages.

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Being of opinion that Mr. Ronan's notice was irregular, we affirm the order appealed from refusing the defendants motion. The plaintiffs were not altogether right in the Vice-Chancellor's Court, not because their notice of trial was not right, but because they were trying to get more than they were entitled to, and were taking away a right to trial by jury of what was a part of the action as it then stood. The respective parties must bear their own costs of and incidental to the motion in the Vice-Chancellor's Court, but we shall make the costs of this appeal costs in the action for both parties.

The result of the appeal has been to place the action on intelligible lines, and to enable it to be carried to a satisfactory trial; it also settles to some extent the principle applicable to similar cases in future. Some proceeding was necessary, in our view, to effect these objects, and the costs of it should be costs in the action. Our order as to costs is not perhaps logical; but it is substantially just.

- We do not touch on the question of exercising the jurisdiction of the Chancery Division under Order XXXVI., Rule 8. That is an ancillary jurisdiction applicable to all cases. We hold that this action, in the form to which our order reduces it, is cognizable in the Chancery Division without a jury. We say nothing to prejudice the jurisdiction of the Court to get the assistance of a jury under Order XXXVI., Rule 8, but we give no encouragement to the defendants to apply for an exercise of that jurisdiction.

WALKER, L.J.:—

I concur. We have had a long and interesting legal discussion during the hearing of this appeal, as to the rights of parties when a claim for unliquidated damages is joined with equitable claims; but the claim for negligence has been abandoned by the Crown as not material to their case, and we have ordered that that part of the action should be struck out. This having been done, what is the case presented to the Court upon the pleadings? It is that the Department employed Charles W. Studdert to purchase horses for them through the country at a price not exceeding £30 a-piece, on the terms of being paid 40s. a-day for his work, and

his expenses also paid. Charles W. Studdert has a son, John A. Studdert, who lives with him, and a son, Thomas Studdert, and a son-in-law, John W. Gregg.

So far as regards the case left, now that Widger has been struck out of the action, it is that C. W. Studdert was paid £30 each for 323 horses, which were bought in fact at a much less price, and that he made a profit on his agency, which he divided with accomplices—his two sons and son-in-law. That as regards 124 horses he put forward a man named Patrick Collins as a seller, though he never sold a horse, and represented that he paid him £30, *i.e.* £3720, though he and John Studdert bought them at much less, and that he and his son John shared the profits.

That as regards 142 he put forward one Fletcher as the seller, who was a partner of his son Thomas, and paid £30 each, *i.e.* £4260, though they really cost less, and that he and Thomas shared the profit.

As to 57, he represented that he bought them at £30 from J. W. Gregg, *i.e.* £1710, though they were bought for less, and that he and his son-in-law, Gregg, shared this.

It is charged (and it would follow) that the horses bought really at low prices were inferior in quality, strength, and condition to what could have been purchased. It is stated that he fraudulently represented that he had bought the horses for prices largely in excess of the prices he actually paid, and that his two sons and son-in-law conspired with and aided him in his breach of duty.

These last three allegations are nothing more than statements of the nature of the acts they did—Charles W. Studdert singly, and all together—and in paragraph 41 there is a charge directly against Charles W. Studdert only, that as purchasing agent he was guilty of negligence in purchasing and passing horses wholly unfit for the purposes which he was employed to carry out.

All these charges, except the negligence, are only an evolution of the breach of his fiduciary agency, and if the charges of breach of duty are true, a statement of what follows proves their existence. This action is now as against Charles W. Studdert and his three alleged accomplices, an action in respect of an agency, and a claim to discover and have disgorged for the benefit of the

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Walker, L.J. Having thus before us an action which is now a Chancery one purely, it is unnecessary to consider the case of an action which had in it two causes of action, one a Chancery one, and the other an old Common Law claim involving a question of fact, which, before the Judicature Act, a party to the action was entitled as of right to have tried by a jury.

But there were some important steps taken by the parties in the action while it retained its composite character. On the 11th December the defendants served notice of trial by a Judge with a jury, and the officer refused to set it down. We hold that that notice was irregular, because it required the trial of what was save in a very small part a Chancery action by a jury, and the officer was right in refusing to set it down. The plaintiff served his notice of trial on the 14th December in the ordinary form used in Chancery actions, and on the same day set it down before the Vice-Chancellor. The plaintiff's notice was equivalent to a notice of trial according to law. Then came the motion of the defendants, before the Vice-Chancellor, that the plaintiff's notice of trial should be set aside as irregular as it was served after the defendants' notice, and that the proper officer should set down the action on the defendants' notice, or that the action should be tried by the Vice-Chancellor with a jury, or that the issues of fact should be tried by a jury. That notice, I think, was irregular, and the defendants were not entitled to carry it.

I am not at all prepared to say that the English decisions on the rules in force in England as to composite actions which have been cited are applicable to the present case, because the Irish Judicature Act is different from the English in the provisions of section 48; and any rules which would go beyond that section would be *ultra vires*. Any party who was entitled before the Judicature Act to have any questions of fact tried by a jury cannot be prejudiced or have that right taken away. Such a case must be dealt with by an order in the action, saving the right and providing for it. The notice of trial which is given in

the forms does not meet the case, and the party who wants to have his rights protected must come to the Court to have his rights provided for. There is ample machinery in the rules to meet the case.

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Order XVIII., Rule 1, provides that if it appears to the Court or a Judge that any causes of action which have been joined cannot be conveniently tried together, the Court or Judge may order separate trials of any such causes of action. Rules 8 and 9 of the same order provide for the striking out of any part of the action if the Judge thinks they cannot be conveniently disposed of together. Further, Order XXXVI., Rule 8, provides that the Judge *may* at any time order issues of fact to be tried by different modes of trial and before the other questions in the action.

I shall only add a few words as to the former appeal in the present case. It came before us on an appeal from the order of the Vice-Chancellor transferring the action to the King's Bench Division. The alternatives presented to us were a trial in the King's Bench, and, therefore, by a jury, and one before the Vice-Chancellor which it was assumed was without a jury. I stated that in my opinion it was a proper case to be dealt with by the Judge alone, and I do not recede from that opinion. We were not asked to express an opinion on the question of the right of the defendants to have questions of fact, arising in a composite action, tried by a jury. That was reserved for the discussion on the present argument which seems to me to have become immaterial when we have made the amendment striking out the claim for negligence.

HOLMES, L. J. :—

The reversal by this Court of the order of the Vice-Chancellor transferring the action to the King's Bench Division could not have been made if the Court had not held that the defendants were not entitled, as of right, to have the entire action tried by a jury. It is inconceivable if this right existed that a purely discretionary order would have been reversed for the purpose, or at least with the result, of sending a jury action to a Court where in its normal condition there is neither jury panel nor jury box, to be tried by a Judge, who in a judicial career of

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thirty-four years has only on three occasions had the assistance of a jury. I am therefore of opinion that the question has been already decided in this action by this Court, and that I should be obliged to follow that decision, even if my own view of the law were different. I am, however, quite satisfied that, taking the action as a whole, the defendants are not entitled to a jury as of right. The case against the defendants generally rests upon the obligation of an agent to account for all moneys received by him on behalf of his principal; and the other defendants are joined with the agent on the ground that they combined with him in withholding or misapplying portion of such moneys.

The Court of Chancery would always have entertained a bill of complaint of this character, and the relief given would have been in effect a decree to restore or hand over to the principal the sums which had been thus withheld from him. I am satisfied that the greater part of the statement of claim sets forth such a cause of action; and it cannot be denied that to this extent the defendants are not entitled to a jury as of right. There is, however, joined to this cause of action another of a wholly different kind—a claim for unliquidated damages caused by the negligence of Charles Washington Studdert alone, as purchasing agent of the plaintiffs, in passing and purchasing horses unfit for the public service. This is a pure common law action which could not have been maintained in the Court of Chancery at the time of the passing of the Judicature Act, and which at that period either party had a right to have tried by a jury. If this be so, this right is preserved by the 48th section of the Irish Act; and no rule, or order of a Court, can deprive a litigant of it. Having come to this conclusion upon words not to be found in the English statute, I do not consider it necessary to examine the English cases. Whatever may have been decided in England, it cannot affect the construction of a provision applicable to Ireland alone; and if we were to hold that a plaintiff can deprive a defendant of his statutory right to have a jury to try a particular cause of action by joining with it another cause of action which did not carry with it such a right, we should be repealing portion of an Act of Parliament.

The present action consists of two parts—one, as to which the

defendants can claim trial by jury, another which under ordinary circumstances is tried by a Judge alone, although in his discretion he may order another mode of trial. The combination of the two causes of action does not result in a deadlock. Provision is made by the rules for dealing conveniently with an action like this. The Court is authorized to strike out one of the causes of action or to direct that they should be tried separately—one with, the other without, a jury. In the present case I am clearly of opinion that it would not be expedient to try the cause of action against the agent and his alleged co-conspirators for an account with a jury; and as the defendants are not entitled as of right to this mode of trial, it ought to be tried by the Judge himself. The other cause of action, if it were to go to trial, must be disposed of by a jury; and if the plaintiff had not consented to withdraw it, we should be obliged to consider whether we ought to strike it out, or direct it to be tried separately by a jury.

I have thus far dealt with the legal rights of the parties as to the mode of trial; but I have not failed to notice that Mr. Ronan, especially in his reply, dwelt on the procedure or machinery by which these rights are to be secured rather than on the rights themselves. He claims that the notice of trial served by the defendants was regular, and that the action ought to have been set down for trial thereon; and he argues that if this be so it followed that the Vice-Chancellor ought to have granted the first part of his notice of motion. He is, I think, right in this, although he would thus be gaining only a Pyrrhic victory, as the plaintiffs would certainly be entitled to apply for an order to try the Chancery cause of action without a jury, an order which I have no doubt would be made almost as a matter of course. But I am of opinion that the defendants' notice of trial is irregular. When I spoke during the argument of a *casus omissus* in the rules, I referred to the rules as to notice of trial. I think that a suit combining two causes of action, to only one of which a right of trial by jury belongs, was not present to the minds of the framers of Order XXXV., Rules 3 and 4; and that when the defendants' notice asked that the whole action should be tried with a jury it went too far, and was therefore irregular. Mr. Ronan says that if this be so the plaintiffs' notice was also irregular; and if such notice

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had been for the trial of the whole action without a jury I should have agreed with him. The plaintiffs' notice, however, following the form given in the schedule to the rules of a "notice in an ordinary action," says nothing as to the mode of trial; and I construe it as meaning "trial according to law."

The Court is relieved, by the withdrawal by the plaintiffs of the Common Law part of their claim, from any difficulty that might have been caused thereby. The order which we propose to make leaves the action a purely Chancery suit, which will be tried in the usual way by the Judge alone, without derogating from any right given to litigants by the 48th section of the Judicature Act.

Solicitors for the plaintiffs: *S. & R. C. Walker & Son.*

Solicitors for the defendants: *Herin, Denroche, Molony, Dunford.*

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Landlord and tenant—Lease—Restrictive covenants as to building—Several sub-leases made subject to covenants in the head lease—Acquisition of reversion by lessee—Implied obligation on lessee towards sub-lessees to observe restrictive covenants—Building scheme.

By lease, dated the 15th February, 1854, the Earl of R. devised two adjoining parcels of land near Belfast to W. T. for a term of 1000 years, at a yearly rent, and subject, among others, to covenants on the part of the lessee (a) to expend a sum of £500, at least, in erecting a private dwelling-house on one parcel of the demised premises; (b) not to use any house on either parcel except as a private dwelling-house, or as a "tea" house, without the consent, in writing, of the lessor; (c) that each private dwelling-house to be occupied on the smaller parcel must, except with the consent of the lessor, have cost at least £400; (d) that in the event of the lessee erecting on the larger parcel a house of public entertainment the same should be shut in by planting from the view of the adjoining premises; and (e) that each house intended to be erected on the larger parcel should be of the annual value of £25 at least. At different dates during the next ten years W. T. made nine

different sub-leases, eight of which were stated expressly to be subject to the covenants and restrictions contained in the head lease. Three of these sub-leases contained covenants by the sub-lessees for the expenditure of money in building, and restricting the user of the houses on the premises; but these covenants were not identical with, nor in some cases even consistent with, the covenants by the lessee in the head lease. Others of the sub-leases contained no provisions as to building or restrictive covenants on the user. Having made these sub-leases, W. T. built a handsome villa on the remaining portion of the demised premises retained in his hands. The portions of the premises comprised in the sub-leases which contained no restrictive covenants, became vested in the plaintiff, and the residue of the premises comprised in the head lease, as well as the estate and interest of W. T. under the head lease, became vested in the defendants, who also acquired the reversion in fee-simple expectant on the determination of the head lease. The defendants, after becoming so entitled, built upon the larger portion of the land demised in 1854 seven shops and several cottages not of the annual value of £25 each:—

Held (by the Court of Appeal, reversing the decision of the Master of the Rolls), that there was no express or implied obligation to observe the covenants in the head lease which the plaintiff—as entitled to the land comprised in the sub-leases which she had acquired—could enforce against the defendants, and that she was not entitled to obtain an injunction restraining the defendants from building and using the premises in a manner different from that allowed by the head lease.

ACTION.

The Earl of Ranfurly, who was owner in fee, by lease dated 1st April, 1836, demised to Henry Waterson “a farm or parcel of land in the townland of Strandtown, containing 12A. 3R. 16P.,” and by an agreement, made 30th October, 1839, agreed to let to W. T. Waterson “that farm or parcel of land next adjoining on the north side of the premises aforesaid, containing 6A. 0R. 24P.” This lease and agreement were subsisting, and were vested in W. T. Waterson when he surrendered them on taking out the lease next mentioned.

By a lease dated 15th February, 1854, the Earl of Ranfurly demised to W. T. Waterson the leasehold of 1836, called No. 1, and the tenement of 1839, called No. 2, making together an almost rectangular plot, containing 19 acres. Mines and minerals, stone and gravel, timber and royalties were reserved to the lessor. The term granted by the lease was 1000 years: a bulk rent in

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respect of both plots was reserved, viz. £214 12s. 11d. reducible to £114 on observance of the lessee's covenants. There were covenants by the lessee to grind corn at a mill to be appointed by the lessor; to expend not less than £500 in building a dwelling-house and office-houses on No. 2; not to use any house built on No. 2 otherwise than as a private dwelling-house; any house to be built thereon to cost at least £400; not to use any house on either No. 1. or 2 otherwise than as a private dwelling-house or tea and refreshment house without the consent in writing of the lessor; to shut in by planting from the view of the adjoining premises any house to be used on No. 1 as a refreshment house; that the other houses to be erected on No. 1 should be used for private dwelling-houses, and should be of the yearly value of £25 at least. The terms of this lease are more fully stated in the report of *Craig v. Greer* (1).

By an under lease, dated 24th February, 1854, W. T. Waterson demised to J. D. Entwistle for 999 years, at a rent of £18 10s., a portion of No. 2, containing 3A. 0R. 24P., excepting and reserving as was by the lease of 15th February, 1854, excepted and reserved, and subject to all and singular the clauses and covenants therein contained. There was power given to the sub-lessee to pay his rent to the head landlord; and the sub-lease contained covenants by the sub-lessee to expend £400 in building a house and offices, not to permit any house on the premises to be used otherwise than as a private dwelling-house without consent of Waterson, and that each such dwelling-house should cost at least £300, and also a clause of re-entry if any house built cost less than £300.

By another under-lease, dated 5th April, 1854, Waterson demised to James Hewitt for a term of 999 years, and at a rent of £18, the remaining 3 acres of No. 2, excepting and reserving as in the head lease, and subject to the clauses and covenants therein contained. There were covenants by the sub-lessee to erect a house on the premises at a cost of £300, and not to permit any house thereon to be used otherwise than as a dwelling-house without Waterson's consent.

By an under-lease, dated 24th March, 1859, Waterson demised

(1) [1899] 1 I. R. 258.

to Arabella Greer for a term of 500 years at a rent of £25 7s. 6d. premises known as "Edenvale," containing 2A. 2R. 6P. (forming portion of No. 1) "subject to the clauses and covenants in the lease under which the lessor derives." By another under lease executed on the same date Waterson demised to Sarah Greer for a term of 500 years, at a rent of £22 17s. 6d., premises known as "Laurel Lodge" containing 2A. 1R. 6P. (forming portion of No. 1) "subject to the clauses and covenants in the lease under which the lessor derives." Neither of the under-leases of 24th March, 1859, contained any provision requiring the expenditure of money in building by the sub-lessee, but only the usual covenants to pay the rent and keep the premises in repair.

By an under-lease dated 8th June, 1860, Waterson demised to Thomas Kelly for a term of 500 years, at a rent of £47, a further portion of No. 1, viz. the premises known as "Sydenham," a piece of ground including four dwelling-houses called "Ranfurly-place," the cottage, stable, and premises in the occupation of the lessee, and two slated cottages in the occupation of John Colville and James Spencer, with the gardens in the reere thereof. The sub-lessee covenanted to expend £500 in building a dwelling-house and not to permit any house of less value than £500 to be erected; that no building should be commenced unless the lessor first approved in writing of the site and plans. There was also a covenant that the sub-lessee would do some planting for the benefit of "Edenvale." The demise was made subject to all the clauses, covenants, restrictions, and agreements in the head lease. There was an endorsement on the under-lease giving Kelly permission to erect cottages fronting Belmont-road, between Ranfurly-place and his own house, on submitting the plans and elevations to the lessor and obtaining his approval in writing. This endorsement was made prior to the execution of the under-lease.

By an under-lease, dated 1st December, 1860, Waterson demised to Sarah Greer for a term of 500 years at a rent of £10 a further portion of No. 1, known as "Maryville" or "Redcliffe." This letting was made subject to the clauses and covenants in the head lease, but it contained no covenants by the sub-lessee to build or to use the premises in any specified manner.

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By an under-lease, dated 31st July, 1861, Waterson demised to Arabella Greer for a term of 500 years, at a rent of £1 12s. 8d., a further portion of No. 1, viz. 29 perches lying between the plot demised to Kelly and "Edenvale," demised to Arabella Greer by the under-lease of 24th March, 1859. This under-lease was made subject to the clauses and covenants in the head lease, but contained no covenants by the sub-lessee requiring her to expend money or restricting her user of the premises.

By an under-lease, dated 25th December, 1863 (reciting an agreement of 17th October, 1862, whereby "Seville Lodge," described as "being dilapidated," had been let to Arabella Greer on the promise of a long lease in consideration of her making it habitable by rebuilding it), Waterson demised to Arabella Greer a further portion of No. 1, described as that parcel of land with the dwelling-house, out-houses, and other buildings and erections thereon commonly called "Seville Lodge" as then in the occupation of Arabella Greer and her under-tenants, containing 2r. 23p., for a term of 800 years in consideration of a rent of £20 and an expenditure by her of £800 in repairing the house: "subject, however, to all the provisos, clauses, covenants, and agreements mentioned and contained in the original lease by which the said premises with others are held under the Earl of Ranfurly." There were in this under-lease no express covenants by Arabella Greer as to user or as to expenditure of money in building.

By an under-lease, dated 5th January, 1864, Waterson demised to Arabella Greer a further portion of No. 1, comprising 1a. 1r. 38p., for a term of 800 years at a rent of £15. This under-lease contained no restrictive covenants or mention of building.

These several under-leases made by Waterson disposed of all the land comprised in the lease of 15th February, 1854, except a piece of ground a little over two acres in size. On this piece Waterson built a handsome villa called Sydenham House, which by an under-lease, dated 2nd August, 1865, was demised by Arabella Greer, as executrix of Waterson, to C. B. Grimshaw for a term of fifteen years, from 1864, at a rent of £120.

Waterson's interest under the lease of 15th February, 1854, was sold in the Landed Estates Court, and was duly conveyed to the purchaser, Robert Ferguson, on 3rd June, 1869, by a convey-

ance, the schedule to which set out the above-mentioned several under-leases.

In 1879, on the expiration of Grimshaw's under-lease, Sydenham House became the residence of Robert Ferguson.

By an indenture of assignment, dated 31st October, 1873, Kelly's interest in the under-lease of 8th June, 1860, was assigned to Robert Ferguson.

By an indenture, dated 2nd December, 1891, Sir Thomas M'Clure and others, in whom the interest of the lessor in the lease of 15th February, 1854, was then vested, conveyed to Robert Ferguson the fee-simple of the premises comprised in the said lease.

Robert Ferguson died on or about 15th August, 1896, and probate of his will was granted to his executors 4th December, 1896.

By an indenture, dated 2nd April, 1897, the executors and trustees of this will conveyed to James Craig—a trustee for Mary Craig—the lessee's interest under the lease of 15th February, 1854, in 5A. 7P. of the premises thereby demised, and conveyed the fee-simple in the entire premises (subject to the sub-leases) to Mary Craig. The 5A. 7P. thus separately dealt with consisted of Sydenham House and its grounds, the premises demised to Kelly in 1860, and Seville Lodge comprised in the sub-lease of 1863.

After becoming so entitled, Mary Craig and James Craig built on the portion of the premises which had been demised to Kelly a street of thirty-three small houses, each of which was of less yearly value than £25, and of which some were used as shops and some as spirit groceries. These houses adjoined the premises known as "Edenvale," demised to Arabella Greer by the under-lease of 24th March, 1859. Since the date of the said sub-lease "Edenvale" had been made a very handsome villa. Mary Craig and James Craig also prepared plans for the erection of another street on the grounds of Sydenham House.

All the estate and interest of Arabella Greer and Sarah Greer in the several under-leases made to them respectively became vested in the plaintiffs, who alleged that their property therein was greatly injured and depreciated by the buildings thus erected and would be further injured by the buildings intended to be erected

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by Mary Craig and James Craig. They accordingly instituted this action against Mary Craig and James Craig and the trustees and executors of Robert Ferguson, claiming an injunction to restrain the defendants from using any house on the premises comprised in the lease of 1854 as a public-house or otherwise than as a private dwelling-house or tea house, or from using any house on the premises as a house of public entertainment in any case in which the same would not be planted round so as to shut it out from the view of the adjoining premises, and also an injunction to prevent the erection of houses of less value than £25 upon the portion of the premises where pursuant to the covenant houses might be erected. The material portions of the pleadings in this action, as well as the facts proved at the trial, are stated in the judgment of the Master of the Rolls.

Matheson, Q.C., Samuels, Q.C., and M'Iroy, for the plaintiffs.

Ronan, Q.C., Hume, Q.C., and Chambers, for the defendants.

July 30.

THE MASTER OF THE ROLLS :—

This action is brought for an injunction to restrain the defendants from erecting on portions of the premises comprised in a lease of the 15th February, 1854, any house or villa other than private dwelling-houses of the yearly value of £25 at least, exclusive of the value of the land belonging thereto. The statement of claim includes other causes of action, but by the course of the trial the controversy was narrowed to this one issue.

By the lease of February 15th, 1854, the Earl of Ranfurly demised to William Thomas Waterson a parcel of land in the townland of Strandtown (marked No. 1 on the map drawn in the margin of the lease), containing 12A. 3R. and 18P., which had been demised to Henry Waterson by lease of April 1st, 1836, and also the parcel of land next adjoining, lying on the north side of the premises (and marked on the said map No. 2), containing 6A. 24P., and which premises were the premises mentioned in a memorandum of agreement of October 30th, 1839, from the Earl of Ranfurly to William Thomas Waterson, all which

premises were situate in the townland of Strandtown, parish of Holywood, and county of Down, for the term of 1000 years, from 1st November, 1853, subject to the yearly rent of £214 12s. 11d., reducible to £114 as therein mentioned.

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The lease contained a covenant by William Thomas Waterson for himself, his executors, administrators, and assigns, with the Earl of Ranfurly, his heirs, and assigns, that he, William Thomas Waterson, would build a dwelling-house and offices thereon at the expense of at least £500 within three years, and also that he, his executors, administrators, and assigns should not use or occupy any house, tenement, or building then built or which should or might at any time or times thereafter be erected or built on the thereby demised premises or any part thereof, or set or let the same for the purpose of or otherwise permit or suffer the same or any part thereof to be used or occupied as or for a common public-house or standing dram shop, mill, or factory, or for any other purpose whatsoever, except as and for a private dwelling-house or private dwelling-houses or a tea and refreshment house, without the consent in writing of the Earl of Ranfurly, his heirs, or assigns, first had and obtained under penalty of forfeiture of the said demise.

The lease also contained a covenant on the part of the lessee, that William Thomas Waterson, his executors, administrators, or assigns would not use or occupy, or permit or suffer to be used or occupied, any house, tenement, or building then built, or which should thereafter be erected or built, on that part of the thereby demised premises described as having been comprised in the agreement of the 30th October, 1839, and marked on the map No. 2, for any other purpose than a private dwelling-house or private dwelling-houses only, each of which said private dwelling-houses should have cost in the erection thereof a sum of at least £400 sterling, under penalty of forfeiture, and in case any house, tenement, or building then built, or which thereafter should be built on the premises, should at any time be so used, it should be lawful for the Earl of Ranfurly, his heirs, and assigns to re-enter and repossess the premises, and also (and this is the most important provision) that in case William Thomas Waterson, his executors, administrators, or assigns should erect on any part of the

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premises described in the lease of the 1st April, 1836, any building to be used or occupied as a house of entertainment as therein-before specified; that in such case all such part of the premises whereon such house should be so erected, together with such part as might be used for pleasure or other ground attached thereto, should be planted round, and all such planting should be kept so as effectually to shut out all such part of the premises from the view of the adjoining premises; and that the villas intended to be erected on the premises comprised in the lease of 1836, which should not be required to be shut out from the view of the adjoining premises by planting, should be for private dwelling-houses only, and should be of the yearly value of £25 each at least, exclusive of the value of the land belonging thereto.

By deed poll of the 3rd June, 1869, Judge Lynch, as a Judge of the Landed Estates Court, conveyed to one Robert Ferguson the lessee's interest in the lease of 1854, subject (amongst other things) to nine sub-leases; and by deed of the 2nd December, 1891, Ferguson acquired the estate and interest of the lessor in the same premises. Ferguson died in August, 1896, having by his will devised to the defendants, Henry Cooke Craig and Alexander M'Dowell, all his lands, of whatever tenure, upon certain trusts; and by deed of the 2nd April, 1897, the defendants, Henry Cooke Craig and Alexander M'Dowell, in consideration of the sum of £5728 6s. 8d. paid to them by the defendant, Mary Craig, and at her request assigned to her brother-in-law, the defendant, James Craig, portion of the premises comprised in the lease of the 15th February, 1854, situate on the north side of the Strandtown or Belmont-road, containing .5 acres and 7 perches, statute measure; to hold for the residue of the term of 1000 years granted by the said lease, subject to the rent thereby reserved and the covenants by the lessee and conditions therein contained, upon trust for the defendant, Mary Craig, her executors, administrators, and assigns; and by the said deed the defendants, Henry Cooke Craig and Alexander M'Dowell, granted to the defendant, Mary Craig, the premises above assigned to the defendant, James Craig, to hold to her, her heirs, and assigns forever, subject to the lease of the 15th February, 1854, and Mary

Craig covenanted to indemnify Henry Cooke Craig and Alexander M'Dowell against all actions, costs, claims, and demands which might be made in respect of the rent reserved by the lease and covenants by the lessee contained therein.

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Thus the entire interest of lessor and lessee in the premises comprised in the lease of 1854, having vested in the defendants, Henry Cooke Craig and Alexander M'Dowell, 5 acres and 7 perches thereof became vested in the other defendant, Mary Craig, in fee, and in the defendant, James Craig, junior, for the residue of the term of 1000 years under the lease of 1854. The defendants, therefore, may be described as representing among them, for the purpose of the suit, the entire interest in fee and the entire interest under the lease of 1854.

The plaintiffs' title is under six of the nine under-leases I have already referred to, which were made by Waterson to ladies named Greer, four to Arabella Greer, and two to Sarah Greer. These leases bear date, two on the 24th March, 1859, one on the 1st December, 1860, one on the 31st July, 1861, one on the 25th December, 1863, and the last on the 5th January, 1864. The lessees' interests were conveyed to the plaintiffs by deed of the 25th January, 1888.

All these under-leases, save that of the 5th January, 1864, Waterson to Arabella Greer, contained covenants by the sub-lessees to observe and perform all the clauses and covenants in the head lease of 1854. This lease of 1864 was of about $1\frac{1}{2}$ acres, at the rent of £20, and for the term of 800 years. The premises immediately adjoined the grounds of Edenvale, with which they were taken, and of which they have ever since formed part, and as a juror I am of the opinion that Arabella Greer, who was tenant and lessee of Edenvale, took them for that purpose to the knowledge of Waterson. This may account for the omission of the covenant in question, if that omission was not wholly accidental.

I do not think it needful to go more minutely into the title, which is set out at greater length in the statement of claim, and also in the report of *Craig v. Greer* (1).

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The plaintiffs' case is that the lease of 1854 was made for the purpose of developing the tract of land comprised in it as building ground for villa and other residences of a high class, and that such residences have been erected on various parts of it. Edenvale, in particular, is a charming villa of the best description. The photograph in proof shows this. It is surrounded by handsome grounds, with trees and ornamental shrubs. It, including the $1\frac{1}{2}$ acres comprised in the lease of 1864, was leased in 1872 by Arabella Greer to the late Sir Edward Harland for thirty-one years at the rent of £190, and was occupied by him as his principal residence till his death. He spent large sums in improving and adorning it. Since his death it has been held by Mr. Thomas Walkington at the same rent, the interest in the lease, which will expire in November, 1903, having been acquired by him. On the other under-leaseholds villa residences have also been erected, quite in accordance with the ideas entertained by Lord Ranfurly and Mr. Waterson in 1854.

What the plaintiffs complain of is stated thus:—

Par. 20.—“ The defendants some time prior to the conveyance of April 2nd, 1897, had commenced to erect, and have recently erected, on the south side of the same premises fronting the Strandtown-road, a row of ten small houses, and have also constructed a street on the east side of the said grounds, immediately adjoining Edenvale aforesaid, and erected thereon a row of twenty-three small houses. The thirty-three houses so erected by the defendants are of inferior description, much below the yearly value of £25 each. Several of them are used for purposes other than private dwelling-houses, or tea and refreshment houses, being let by the defendants to be used, and are permitted by them to be used, as shops and spirit groceries. One of the said spirit groceries is situate within about 50 yards of the entrance gate of Edenvale. None of the said houses are planted round or shut out from the view of the adjoining premises. They immediately adjoin the lawn and grounds of Edenvale, and the entrance gate and lodge on Strandtown-road or Belmont-road, and overlook the said avenue, lawn, and pleasure grounds. The said defendants have also prepared plans, which have been approved of by the Belfast Corporation, for the construction of

another street on the grounds of Sydenham House, and the erection thereon of rows of houses of small value."

Par. 21—"The construction of the said street which opens out on Edenvale-avenue, and the erection of the said houses, shops, and public-houses by the defendants, and the character and user of the said houses, and the opening up of the said street into Edenvale-avenue leading from rows of houses of an inferior description to those authorized to be built by the lease of February 15th, 1854, seriously injure the plaintiffs' estate and reversion in the said houses and lands of Edenvale, Maryville, or Redcliffe, and has greatly depreciated the value thereof, and of the premises comprised in the other sub-leases as aforesaid vested in the plaintiffs. Further serious injury will be caused to the plaintiffs' said estate and reversion, but more particularly in Redcliffe and Edenvale, if the defendants construct another street or erect further shops and houses of a class unauthorized by the lease of 1854."

Par. 22—"By constructing the said street and building the said two rows of houses of an inferior description, and demising certain of them for shops and spirit groceries, the defendants have greatly depreciated the value of the premises known as Edenvale, and the other premises so demised as aforesaid to the said Arabella Greer and Sarah Greer, and have derogated from the grants made by the said respective indentures of lease to the said Arabella Greer and Sarah Greer."

The defendants, Mary Craig and James Craig, in their statement of defence (par. 16) deny that prior to the purchase by Mrs. Craig, which was completed by the deed of April 2nd, 1897, they had commenced to build any of the houses complained of in the 20th paragraph of the statement of claim, and further deny that the thirty-three houses referred to in the said paragraph or any of them are of an inferior description, or much below the yearly value of £25, as alleged in the said paragraph; and they further deny that the said houses or any of them overlook the avenue, lawn, or pleasure ground of Edenvale, as alleged in the said paragraph. It was, however, admitted that the houses were below the yearly value of £25, and they do overlook the grounds of Edenvale, though hidden by trees.

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The defence proceeds as follows :—“ The lease referred to in the fifth paragraph of the statement of claim from William Thomas Waterson to Thomas Kelly is dated the 8th June, 1860, and was a demise of 2 acres 1 rood and 11 perches, on which at the time of the said lease there were erected four small dwelling-houses called Ranfurly-place, as well as a cottage and stable, at the date of the said lease in the possession of the lessee, and two slated cottages in the occupation of John Colville and James Spence, and by an indorsement upon the said lease, signed by the lessor, William Thomas Waterson, and dated on the same day as the said lease, it was consented and agreed that the said lessee, Thomas Kelly, his executors, administrators, and assigns, should be at liberty to build and erect cottages on that portion of the demised premises fronting Belmont-road between Ranfurly-place and his own house, on his first submitting the plans and elevations to the said William Thomas Waterson, and obtaining his consent in writing ; and on the 31st October, 1873, the entire estate and interest of the said Thomas Kelly in the said lease became duly vested in the said Robert Ferguson. The lands included in the said lease to the said Thomas Kelly are portion of the 5 acres and 7 perches included in the said conveyance of April 2nd, 1897, and by it vested in the said defendants, James Craig, junior, and Mary Craig, who thereupon became entitled to all the estate and interest of the lessee in the said lease to the said Thomas Kelly, as well as to all the estate and interest of the lessee in the lease of February 15th, 1854, to the said William Thomas Waterson, so far as the said 5 acres and 7 perches of land was concerned, and to the reversion in fee in the said portion of land expectant on the said last mentioned lease.

“ All the houses, the erection of which is complained of in the statement of claim, have been erected upon the land demised as aforesaid to the said Thomas Kelly, and upon that portion of the said demised lands fronting Belmont-road, and lying between Ranfurly-place and the residence of the said Thomas Kelly, mentioned in the indorsement of the said lease hereinbefore set forth.

“ The position of the said land on which the said houses have been erected is eminently suitable for houses of the class, the

erection of which is complained of by the plaintiffs, and is not now, nor was it at any time since 1854, suitable for villa residence. Prior to 1897 a large number of workingmen's houses, small shops, and a spirit grocery of an inferior class to the houses complained of in this action were erected on lands immediately adjoining Edenvale, and the said defendants deny that the erection of the said houses by the defendants or any of them, or the character or user of the said houses or any of them, seriously or at all injure the plaintiffs' estate or reversion in the houses and lands of Edenvale, and Maryville, or Redcliffe, or any of the premises comprised in the other sub-leases vested in the plaintiffs. None of the said defendants' houses are used as public-houses. On the contrary, the said defendants' houses are of the class required in the locality. They are better than the old cottages formerly known as Ranfurly-place, and are an improvement to the district in which they are erected.

“ The said defendants say that on the true construction of the said lease of February 15th, 1854, the Earl of Ranfurly reserved to himself, his heirs, and assigns full power and authority to waive the restrictions contained in the said lease as to the class of houses to be erected on the demised ground, and the nature of the user of the said houses when erected, and that the said Arabella Greer and Sarah Greer, at the time of the granting of the leases now vested in the plaintiffs, had full notice that it was competent for the said Earl of Ranfurly, his heirs, and assigns, to agree with the said William Thomas Waterson, his executors, administrators, or assigns, to waive the said restrictions and consent to the erection of houses, and to the user thereof, other than that mentioned in the said lease, in respect of all or any portion of the premises held by the said William Thomas Waterson, his executors, administrators, and assigns; and the said defendant, Mary Craig, as representing the said Earl of Ranfurly, waived the said restrictive covenants in respect of the portion of ground on which the thirty-three houses complained of have been erected, and erected the said houses accordingly, with the consent of the said James Craig, junior, and claims to be entitled to do so without derogating in any way from the grants under which the plaintiffs claim or any of them.

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"The defendant, James Craig, junior, denies that he built the said houses complained of or any of them, or that he did the acts complained of in the statement of claim, or any of them.

"These defendants further say that the houses complained of in the statement of claim were all erected and built at great expense to these defendants, with the full knowledge and acquiescence of the plaintiffs, who made no objection whatever to the building or erection thereof until the issue of the writ of summons in this action, long after the said houses had been fully completed, and these defendants will rely on the *laches* and acquiescence of the plaintiffs as an answer to their claim in this action."

On the evidence before me I am of opinion that the neighbourhood of Strandtown has to some extent changed since the making of the various building lettings in the sixties. It is less country than it was. It has become more populous, and has been resorted to as building sites for smaller houses, and, in some cases, of workmen's dwellings. Probably it could be most profitably used in that way. There is no great demand for villa sites owing to approach of shops and trams and workingmen's houses. Still this does not or did not till lately apply to any great extent to the Waterson lease of 18 acres, a large tract in itself, and largely occupied with existing villas and other good residences. The question is whether the plaintiffs are entitled to retain their part of that tract as it is, or whether the defendants are at liberty to erect any kind of dwelling-houses they please on their portion of it, even though by so doing they may injure the plaintiffs' premises or render them unfit for the residence of people of the wealthier classes altogether.

That the covenants in the lease of 1854 are carried on into the under-leases (with the one exception I have referred to) there is of course no doubt; that it was intended that those covenants should regulate the enjoyment of the property, whether binding by direct privity or not, I have no doubt. But the defendants say that these restrictive covenants were with Lord Ranfurly, his heirs and assigns, and that by express covenant he was at liberty to waive them, and as his reversion in fee is vested in Mrs. Craig she has the same right, and has exercised it. Just as notice of the

restrictive covenants is imputed, and rightly imputed, to the derivative lessees, so notice that these restrictive covenants might be waived is also to be imputed.

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As general propositions these things cannot be gainsaid. It is a question how far they conduce to a solution of the difficulty. With or without express agreement, the power at law to waive or alter at the request of the lessee any covenant in a lease made by an owner in fee must always exist when there is an owner in fee. The expression of it really adds nothing to the power. But it is relied on as showing that the under lessees having express notice that the restrictive covenants in the lease of 1854 might be waived by agreement between the lessor and lessee, must be assumed to have contracted with reference to that state of facts, and therefore cannot have calculated upon the other integral portions of the Strandtown lands always retaining, or retaining at all, their character of villa and residential sites of a special type as distinguished from ordinary ground suitable for building.

It is on this consideration that the most important issue is involved; for as there is no direct covenant by the owner in fee with (say) Arabella Greer, nor any by any of the other under-lessees with her, against building any particular class of house, her assignees cannot rest their claim on direct covenant. It must be found, if at all, in facts from which the inference of an implied obligation equivalent in equity by reason of notice to a covenant such as is to be found in the "building scheme" cases, arises; and while the existence of the very stringent and exact covenants in the lease of 1854 is of course a circumstance of enormous strength in leading to that inference, the express notice given that they may be waived without the necessity of any consent by the under-lessees cannot be left out of sight. But I have already pointed out that whether expressed or not, the legal power must always exist; and in *Knight v. Simmonds* (1) the form of the plaintiff's covenant was not to carry on trade, &c., without the vendor's consent in writing, and this circumstance was held not to affect the case.

Here there can be no doubt that when Waterson obtained his

(1) [1896] 2 Ch. 294.

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lease he took it for the purpose of building, by himself or his under-tenants, high-class dwellings of a defined minimum value upon the land; and there is no other inference to be drawn in the case of the under-lessees themselves, who counted not alone on having each his or her plot to build on as it stood, but also on the retention by the entire 18 acres of the character stamped upon it by the head lease. If the lessee of Edenvale had not known that Waterson's take was of a strictly defined character, and that Waterson was bound by covenant to preserve that character, Edenvale House would not have been built or improved.

But Mr. Ronan very much pressed the judgment of Romer, L.J., (when a Judge of the Chancery Division) in *Tucker v. Fowles* (1) as not only describing, but as defining all the essentials of "building estates" within the peculiar rules of equity applicable to them. I do not find, however, that he did anything of the kind. In the case before him he found that there was not, in fact, any such general scheme as would bind all the purchasers of separate parts of the estate. He says at page 203:—

"No doubt the vendors contemplated at that time selling the estate in building lots, and I think they probably contemplated these lots being sold substantially, according to the plan which they had deposited with the sanitary authority. I think, speaking generally, that the vendors contemplated that the houses to be erected on the estate should be of a good class and of a residential character, and, probably, that so far as the houses were concerned—again speaking generally—they should not be of less than £800 value each. And I think it may fairly also be said, as against the vendors, that they contemplated that, as to many of the lots, there should be some more or less restrictive covenants, and probably, in many cases, covenants like that contained in clause 9. But beyond this I do not think that there ever was, at the date I am considering or at any time, a definite building-scheme formed by the vendors. In particular, I do not think, on the evidence before me, that there ever was a definite scheme come to by the vendors that each lot should be subject to the restrictive covenants mentioned in clause 9, or that each lot should of necessity have a

(1) [1893] 1 Ch. 195.

house upon it, or that every house which was erected should of necessity be worth at least £800, or that no stables should be erected on any plot."

At page 204 the Judge goes on:—"In favour of the plaintiffs, on the evidence before me, I cannot gather more than this—that, without fixing themselves to any definite binding scheme, the vendors may be taken to have contemplated, in many or all of the cases when they sold the different plots, that they would take from the purchasers some such covenants as are mentioned in clause 9 or the covenants therein mentioned." And at p. 205 he says:—"No doubt the vendors contemplated the estate being a residential one, and that substantially the plan of the estate, which I have referred to, should be worked out; but I do not think that I ought to gather, as against the vendors, from the facts before me, that they must be taken to have contemplated that they would never, in any respect, change this plan, but would rigidly adhere to it exactly as drawn; or that they were bound by a definite arrangement that each plot should have one house, and nothing but a house, except possibly a greenhouse or conservatory. And I think in dealing with this matter that it is not wholly to be disregarded that, when the vendors came to deal with individual purchasers like the plaintiff Herridge, the plan upon the agreements between them did not show the whole estate or all the plots, and did not, on the few plots shown, which were only those immediately surrounding the plot sold, show any house at all. But, whatever the effect of this may be, the evidence has satisfied me that the vendors did not contemplate that they should be so rigidly bound by the plan or by the printed form of agreement as is suggested." The Judge then held that the action failed. It was a case which depended upon evidence apart from covenant.

Tucker v. Vowles (1) cannot govern a case where there is a general covenant binding the estate and carried into each separate portion of it (with the unimportant exception I have referred to), showing in the clearest manner that certain restrictions were to be observed not as matter of expectation or as in contemplation, but by convention.

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Nor do I think that the fact of the lettings by Waterson having been made at different times really affects the question. Belfast in 1854 was a very different place from what it is now, and the development of the estate must have been slow. It is not surprising that it took ten years. Further, there is no defined building-plan prepared by Waterson, showing the different plots, and laying down roads and boundaries. Such a plan would have prevented building and defeated its own object. The intention obviously was that the ground should be used at the pleasure of those who invested in it—not by building formal houses of a set type in a fixed position, but by consulting their own taste in each instance. If it was with this idea that each lease was made and accepted, if each lessee counted upon all the others observing the covenants, I think the case comes within the principle of the cases referred to as the building scheme cases. They all took with express notice of the covenants binding all the interests.

In *Craig v. Greer* (1) Holmes, L.J., says:—"At the same time, if the lessee of 1863 is subject to the equity to which I have referred, he seems to me to have a corresponding equity. When Lord Ranfurly made the first demise, he separated premises therein contained from the rest of the property in the neighbourhood of which, I presume, he was owner, taking from his lessee covenants for his own benefit, and stamping thereby on the leased lands a certain character. His doing so (as far as appears from the evidence in this action) had no relation to and was not connected with any intended user of the surrounding lands; and I agree with Mr. Ronan's proposition that the lessee would not have been relieved from his covenants if his landlord had covered the property he retained with public-houses, shops, or factories. I think, however, that Waterson and his assignees stood and stand in a different position to Miss Greer. When by the lease of 1863 she became bound to observe in her dealing with the half-acre demised to her the covenants in the head lease, it was well known both to her and to her lessor that these covenants attached to upwards of eleven acres adjoining, and that if she

(1) [1899] 1 I. R. at p. 305.

had a burden imposed on her own holding, she would enjoy the benefit that her holding would derive from a neighbourhood of private houses. This appears to me to make the case analogous to *The Duke of Bedford v. The Trustees of the British Museum* (1) and the building scheme cases; and I should be prepared to apply the principle of those decisions to the present action, if the other facts permitted me to do so. If, for example, Waterson or Ferguson had, either before or after the fee was acquired, converted the rest of the twelve acres into streets of shops or stores, I am of opinion that this action for an injunction could not have been maintained. They would have been disabled by their own conduct from enforcing specific performance of the covenant." The same view is implied in the judgment of Fitz Gibbon, L.J., who says at p. 290:—"I can find nothing in the evidence to indicate any release from these restrictions, or any equitable estoppel against insisting upon them, which could now prevent the owners in fee, or indeed even the under-tenants of other portions of the 19 acres, other than the plaintiff, if injuriously affected by breaches of the original covenants, from enforcing those covenants."

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The case appears to have a much closer resemblance to *Martin v. Spicer* (2) than to *Tucker v. Vowles* (3). I may refer also to the last case on the subject, of *Rogers v. Hosegood* (4).

Then can the defendants justify what they have done by the aid of the superior interest acquired by Ferguson? I am of opinion that they cannot. Had Lord Ranfurly been alive he might or might not have sued Waterson's representative on the covenant. Waterson's representatives might or might not have sued the under-lessees. But the obligations of the latter among themselves cannot depend upon the same considerations. Each took with notice of his obligations to all the rest.

As to the argument that this is not a "building scheme" at all, I recognize that it is not in form identical with, perhaps not even similar to, the scheme usually devised for building purposes. But it is impossible that anything can depend

(1) 2 Myl. & K. 552.

(2) 34 Ch. D. 1.

(3) [1893] 1 Ch. 195.

(4) [1900] 16 Times L. R., 20, 489.

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upon the form if the substance be the same. Our system of equity and its principles are older than the building-scheme cases. It would be against all principle to hold that Waterson by acquiring the fee could have deprived his own lessees of a great part of the value of the valuable property he had leased to them and altered the whole character of the estate which he had represented to them it would bear during his lease. *Pigott v. Stratton* (1) throws some light on this part of the case.

The defendants further allege that by the building of the small houses in the vicinity the locality is altered, and that this, and not what they have done, is the cause of the depreciation, if any, of the plaintiffs' property. That small houses, somewhat similar to those erected by the defendants, have been built near the place in question is unquestionable, but as a matter of fact they are not situated so as to injure the plaintiffs' premises so much as those complained of, and the tract of 18 acres is so large that much of it could not be materially injured save by building upon some *other* part of it.

For the building of the small houses actually erected the plaintiffs now seek no relief, wisely I think, for they have not come in time. But the defendants' plans show the intention to continue the erection of streets of smaller houses right up to Edenvale-avenue, where I am satisfied they would be a most material injury to plaintiffs' property. The defendants say in reference to this that they did not mean to continue these houses or prolongations of streets at all. But their plans, lodged with the Corporation of Belfast, showed that they did. An explanation of this was offered, I hope inadvisedly. It is stated that the Corporation would not take over streets unless the plans showed them as running from one street to another, and not being *cul-de-sac* in fact, and that the borough surveyor said: "Oh, show it on your plans, and you need not make the streets any longer than you choose afterwards." This would have been a most discreditable transaction if it had occurred, and I cannot attend to the suggestion as affording any answer to this action.

(1) Johnson, 341.

There must be an injunction, with costs, against the defendants other than the trustees.

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As to the latter, their defence is that they have done nothing; that they parted with the land at the place in question before the houses were built, and that they should go free of the action. I think they must. They can only have been joined as defendants under a misapprehension. The action must be dismissed as against them with costs.

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W. L.

The defendant appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

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Feb. 18, 19,
20.
May 16.

Ronan, K.C. and *Hume, K.C.* (with them *Chambers*), for the appellants :—

The present case does not come within the principles applicable to building scheme cases. There is no covenant here which could be enforced against Lord Ranfurly, whose interest is now vested in the defendants. *Prima facie* the contract is limited by its terms as stated in the document. The onus rests on the plaintiffs of proving any contract other than that in the sub-lease.

The principles applied in building scheme cases are only applicable where a definite building scheme or plan existed at the date of the lease, and was brought before the purchaser at the time he made his purchase: *Nottingham Patent Brick and Tile Company v. Butler* (1), *In re Birmingham and District Land Company and Allday* (2), *Tucker v. Vowles* (3), *Spicer v. Martin* (4). There was no definite building scheme here; none can be inferred from the several sub-leases made by Waterson; the covenants in these sub-leases are so various that they negative the idea of a definite scheme; the covenants in Entwistle's lease differ from those in Hewitt's; those in Kelly's lease differ from those in the two former; none of the several sub-leases made to the Greers, except

(1) 16 Q. B. D. 778.

(3) [1893] 1 Ch. 195.

(2) [1893] 1 Ch. 342.

(4) 14 App. Cas. 12.

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that of Seville Lodge, mentions building; on two of the plots demised to the Greers there are no buildings. Each of the sub-leases was made quite independently of the others. It is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the sub-lessees as against all the others, and this question must be determined upon the same rules of evidence as every other question of intention. There is absolutely no evidence of such intention here. Here, too, portion of the ground was reserved by Waterson himself, who built Sydenham House thereon. This negatives the idea that he took these covenants from each of the sub-lessees for the protection of the others of them; he took them for the protection of himself: *per* Lord Esher, M.R., in *Nottingham Patent Brick and Tile Company v. Butler* (1), and *per* Stirling, J., in *Birmingham and District Land Company v. Allday* (2).

The doctrine of building scheme cases is not to be extended: *per* Lord Macnaghten in *Spicer v. Martin* (3). But if it were to apply here it could only be by a wide extension. It has never been applied to a case like this where—(a) there was no scheme or plan referred to on the occasion of any of the leases; (b) where there were nine leases made entirely independent of one another at different dates extending over ten years, and containing each entirely different provisions; (c) where five of those leases contain no reference at all to building, and where on two of the demised plots no buildings exist; (d) where the entire property was not disposed of at all, nor as far as the evidence goes, intended so to be; (e) where no representation was made to any lessee as to the conditions or covenants affecting the other property. Most of the building scheme cases are cases of sale: that which in some of its facts comes nearest the present is *Pigott v. Stratton* (4), but in that case it would have been in favour of bad faith not to have treated the premises as bound by a restrictive covenant. There is not the slightest suggestion of bad faith here.

Even if an implied obligation such as that enforced in building scheme cases binds the lessor here, it cannot be more extensive

(1) 16 Q. B. D. at pp. 784, 785.

(2) [1893] 1 Ch. at pp. 349-351.

(3) 14 App. Cas. at p. 24.

(4) John. 341; 1 D. F. & J. 33.

than the express covenant binding his lessee; the community of interest on which the building scheme cases depends imports reciprocity of obligation: *Spicer v. Martin* (1).

[They also cited *Renals v. Cowlshaw* (2), *Rogers v. Hosegood* (3), *Keates v. Lyon* (4), *Knight v. Simmonds* (5), *Low v. Bouverie* (6).]

Samuels, K.C. and *M^cIlroy* (with them *Matheson, K.C.*), for the respondents:—

The lease of 15th February, 1854, impressed a certain character on the entire set of premises therein comprised. Waterson's conduct impressed each set of premises comprised in the several under leases in the hands of his sub-lessees with the same character, which those claiming through or in privity with him cannot be allowed to alter. He was bound by the terms of this lease, if he built, only to build houses of a certain character; all the sub-leases except that of 5th January, 1864, were made subject to the covenants contained in the head lease; this implies a covenant from the sub-lessee with his lessor to observe those covenants in relation to the sub-demised premises: *Craig v. Greer* (7). Every sub-lessee had notice of the covenants in the head lease; every sub-lease made by Waterson subject to the covenants in the head lease was a representation by him that the premises would be used in accordance with those covenants; this brings the case within the principles applied to building schemes. No doubt *Pigott v. Stratton* (8) was a case of fraud, but *Spicer v. Martin* (1) was decided simply on a representation such as we have here. All these cases depend on the principle that the enforcement of the common obligation is for mutual advantage.

[They cited, in addition to the cases above-mentioned, *The Duke of Bedford v. Trustees of British Museum* (9), *Collins v. Castle* (10), *Mackenzie v. Childers* (11)].

(1) 14 App. Cas. 12.

(2) 9 Ch. D. 125; 11 Ch. D. 866.

(3) [1900] 2 Ch. 388.

(4) L. R. 4 Ch. App. 218.

(5) [1896] 1 Ch. 653; 2 Ch. 294.

(6) [1891] 3 Ch. 82.

(7) [1899] 1 I. R. at p. 304.

(8) John. 341; 1 D. F. & J. 33.

(9) 2 M. & K. 552.

(10) 36 Ch. D. 243.

(11) 43 Ch. D. 265.

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May 16.

HOLMES, L.J., delivered the judgment of the Court :—

There is no controversy of fact involved in this action, which turns almost entirely on the inferences to be drawn from certain documents.

The foundation of the plaintiffs' case is an indenture of lease dated the 15th February, 1854, and made between the Earl of Ranfurly and William Thomas Waterson. Previous to the execution of this instrument Waterson held two farms or parcels of land called Strandtown, in the neighbourhood of Belfast—one containing about 13 acres under a lease of the 1st April, 1836, the other containing about 6 acres under a memorandum of agreement of the 30th October, 1839. These documents have not been produced, and we know nothing of their contents or of the mode in which the demised premises were used during their continuance. Their surrender was part of the consideration for the indenture of 1854, by which both parcels of land were demised to Waterson for the term of one thousand years subject to the annual rent of £214 12s. 11d., reducible upon due performance of the covenants to £114. Lord Ranfurly appears to have been the owner of the surrounding or at least of some adjoining land which he was at the time of the lease developing for building purposes. I draw this inference as well from the covenants by the lessee as from the length of the term, the high rent, and certain stipulations showing that a new road had been made to the sea of which the lessee was to have the benefit, and that the lessor had laid out and had intended to complete a lane or avenue for the common benefit of the demised and other premises.

The covenants upon which reliance was placed in the argument for the plaintiffs were :—

(a). That the lessee would within three years expend £500 in erecting a private dwelling-house and offices upon the six-acre or smaller parcel ;

(b). That the lessee would not use or suffer to be used any house then built or thereafter to be built on either parcel for any purpose other than for a private dwelling-house or a tea and refreshment house without the consent in writing of the lessor ;

(c). That each private dwelling-house to be used and occupied

on the small parcel must, unless the lessor would otherwise consent, have cost in its erection at least £400 ;

(d). That in the event of the lessee erecting on the larger parcel a building to be used as a house of public entertainment, such building and the ground attached thereto must be shut in by planting from the view of the adjoining premises; and

(e). That each villa intended to be erected on the larger parcel must be of the yearly value of at least £25, exclusive of the value of the land belonging thereto.

There is considerable confusion and surplusage in the language of the lease; and it is difficult with our present information to understand the apparently minute distinctions drawn between the mode of user of the two parcels. I think, however, I have given an accurate, although a very condensed statement, of the material stipulations. They show that building for residential purposes was contemplated; but there is nothing to indicate that either lessor or lessee had in view any definite plan or scheme for carrying out this intention, if indeed it can be said to have amounted to an intention.

The covenants are all negative or restrictive, except the first, which obliges the lessee to expend £500 in erecting a private dwelling-house and offices on the six-acre parcel. He is under no obligation to erect any edifice on the other parcel; and if he chooses to build he is allowed a wide discretion. He may cut up the premises into four or five-acre plots suitable for mansions for the wealthy, or he may cover them with streets consisting of poor men's residences. The expenditure of £500 will only produce a very unpretentious abode; and £25 a-year is a modest rent for a house near a large town. It is probable that fifty years ago building at Strandtown was a doubtful experiment; and neither Lord Ranfurly nor Mr. Waterson had any clear idea what shape the experiment would take, or, if tried, whether it would succeed in any shape.

This appears more clearly from the subsequent dealings with the property. Mr. Waterson having obtained his own lease on the 15th February, 1854, made a sub-lease to James Dunlop Entwistle on the 24th of the same month, demising 3A. Or. 24P. of the six-acre parcel for a term of 999 years at the annual rent

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Appeal. of eighteen guineas. There is in this instrument a reference to the
1901. original lease in the parcels and in the reservation; and the
GRAHAM demise is made subject "to all and singular the clauses and
v. covenants" therein contained. There is also a power given to the
CRAIG. sub-lessee to pay his rent to the head landlord. Waterson, how-
Holmes, L.J. ever does not undertake—at least in express terms—any obligation
to Entwistle relating to his own obligation to Lord Ranfurly, the
only covenant by the lessor being for quiet enjoyment in the usual
form. It is to be observed that although this sub-lease either had
or was intended to have endorsed on it a schedule of the clauses
and covenants in Lord Ranfurly's lease, it not only contains no
express undertaking by Entwistle to observe them, but the obliga-
tions entered into by him with Waterson are in an important par-
ticular inconsistent therewith. He covenants that within three
years he will expend £400 in the erection of a private dwelling-
house and offices; that he will not permit any building on the
premises to be used for any purpose other than for a private dwell-
ing-house; and that each such private dwelling-house must cost at
least £300. Thus in Entwistle's contract with Waterson £300
takes the place of £400 in Waterson's contract with Lord Ran-
furly; but the sub-lessee could only safely act on the reduction
by obtaining the consent of the head landlord. Is not the true
inference to be drawn therefrom that lessee and sub-lessee con-
tracted on the basis that the covenants in the original lease were
only to be observed by either party in so far as such observance
was necessary for the protection of the lessee's interest, and that
Waterson or Entwistle might be relieved from their obligation by
the consent of the head landlord? The next dealing with the
premises, is a sub-lease by Waterson, dated the 5th April, 1854, to
James Hewitt of the remainder of the six-acre parcel for a term
of 999 years at the yearly rent of £18. There is convincing
internal evidence that the previous sub-lease to Entwistle was
taken as the model for this instrument. The terms of the two
documents are identical except in two important particulars.
Hewitt was only to expend £300 in the erection of a dwelling-
house and offices; and the provision as to the minimum cost of
any other dwelling-house disappears altogether. This omission
is the more remarkable, inasmuch as in both the original lease and

in the sub-lease to Entwistle the provision as to minimum cost is worked into and forms part of the covenant that no building erected or to be erected can be used for any purpose other than a private dwelling-house. In Hewitt's sub-lease the last-mentioned stipulation is repeated while the other is left out. The sub-leases to Entwistle and Hewitt included the whole of the six-acre parcel, and the question is suggested what became of Waterson's covenant to expend £500 in building a dwelling-house and offices upon it? He did not perform the covenant himself, and the obligations of this nature (which follow with remarkable closeness the language, in the original lease) imposed on the sub-lessees were only £400 in the first and £300 in the second. I take it that Waterson got the best terms he could from his sub-lessees; and it is not unreasonable to assume that they declined to bind themselves to larger sums.

It is probable that both Lord Ranfurly and Waterson discovered that the provisions of the original lease, moderate as they seem, were too aspiring, and that if there was to be any building it would have to be of a cheaper kind. I have gone thus fully into the contents of these two sub-leases because the argument on behalf of the plaintiff starts from them.

It is said that every letting made by Waterson was on the faith, not merely that he would observe the terms of his own lease (for this might be the effect of the covenant for quiet enjoyment), but that he should not be at liberty to obtain from his landlord the consent in writing by which, according to the express language of his covenants, he might be relieved from their obligation. This argument rests on the theory that Waterson was carrying out a carefully arranged plan or scheme known to all persons taking lettings from him, and affording them an assurance that their holdings would enjoy certain amenities from the mode of user of the adjacent and neighbouring premises. But what evidence is there of this? Do not the transactions with Entwistle and Hewitt show that he was picking up a tenant when he could get one, making with each a bargain, irrespective of his bargain with the others or of his own agreement with his landlord?

For five years after the demises to Entwistle and Hewitt no tenancy of a permanent character was created. At length, on the

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Appeal. 24th March, 1859, Waterson made two leases—one of a plot
1901. containing 2 acres 2 roods and 6 perches to Arabella Greer for a
GRAHAM term of 800 years, at the annual rent of £25 7s. 6d., and the
v. other of a plot containing 2 acres 1 rood and 6 perches to Sarah
CRAIG. Greer for the same term, at the annual rent of £22 17s. 6d.
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The provisions of these sub-leases differ entirely from those of 1854. Neither lessee contracts to expend a penny on the demised premises. Although the names Edenvale and Laurel Lodge occur in the description of the parcels, I gather that the residences that now stand on the two plots were not then built. The tenants might have used all the lands for market gardens or other agricultural purposes. Even in the covenants to maintain the premises in good order and condition there is nothing to show that it was intended that any building should ever be placed on them. The sole reference to the original lease is to be found in the words: "Subject to the clauses and covenants in the lease under which the lessor derives." The only obligations undertaken by the tenants are to pay the rent and keep the premises in proper order, while the lessor covenants for quiet enjoyment, and nothing more.

It is inconceivable, if the landlord was to be restricted in the user that he might make of the adjoining lands, that some indication of it should not appear in these instruments, especially as nothing is to be found therein obliging the tenants to observe the covenants in the head lease, provided Lord Ranfurly consented in writing to their not being bound by them.

Waterson's next letting was to Thomas Kelly, by indenture of the 8th June, 1860. The premises thereby demised are described as Sydenham, and at the date of the lease there were standing thereon four dwelling-houses named Ranfurly-place; the term is five hundred years and the annual rent £47. I would gather from a comparison of some parts of this sub-lease with the sub-leases that preceded it that the prospects of the neighbourhood were improving, for I find that Kelly covenants that he shall expend £500 in building a dwelling-house and offices, that he shall not permit any dwelling-house to be erected of less value than £500, and that no such building shall be commenced unless the lessor first approves in writing of the site and elevation thereof. The

tenant also stipulates to do certain planting for the benefit of Edenvale. It is to be noted that this document differs in its provisions from all the other sub-leases; that the houses and cottages standing thereon were of less value than £25 a-year; and that, therefore, the contemplated letting of them by Kelly would be a violation of the covenant in the lease of 1854, even if they had been built before that date. The letting is made subject to all the clauses, covenants, restrictions, and agreements in such lease; but beyond these words there is no reference thereto. There is an endorsement on or addendum to this instrument made before execution, giving the lessee liberty to erect cottages, fronting Belmont-road, between Ranfurly-place and his own house, on first submitting the plans and elevations to the lessor and obtaining his consent in writing. The description of these buildings as cottages shows, I think, that houses of a less annual value than £25 were contemplated.

Four other sub-leases were made by Waterson, dated the 1st December, 1860, the 31st July, 1861, the 25th December, 1863, and the 5th January, 1864, respectively, the first being to Sarah Greer and the others to Arabella Greer. It is unnecessary to refer in detail to the provisions of these instruments. Except the third, they follow the language of the two leases of the 24th March, 1859, imposing no obligation of any kind on the lessee to expend money on the premises or to use them in any particular way, except in so far as such obligation follows from the letting being subject to the clauses and covenants in the original lease, nor is there any covenant by the landlord save a covenant for quiet enjoyment. A villa called Maryville or Redcliffe was erected on the premises demised to Sarah Greer in 1860; but no building seems to have been placed on those let to Arabella Greer in 1861 and 1864. The latter consisted of comparatively small plots which were added to the grounds of Edenvale. The lease of 1863 differs from the others in the circumstance that it was made in pursuance of a previous agreement by which the lessee had undertaken in consideration of the lease to expend £800 in rebuilding a dilapidated dwelling-house then standing on the premises, called Seville Lodge. The result of the foregoing lettings was to place in the hands of sub-

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tenants all the lands demised by the lease of 1854 except a little over 2 acres. On this portion Waterson, at a date which is not given, erected Sydenham House, which appears from the photographs produced to be a handsome residence with some pleasure-grounds attached. On the 3rd June, 1869, Robert Ferguson became entitled under a Landed Estates Court conveyance to all Waterson's interest in the lease of 1854, subject to the nine sub-leases already mentioned. By an indenture dated the 31st October, 1873, Kelly's interest under the sub-lease of the 8th June, 1860, was also assigned to Robert Ferguson, who by conveyance of the 2nd December, 1891, acquired the reversion expectant on the lease of 1854, which formerly belonged to Lord Ranfurly. Finally, by an indenture of the 2nd April, 1897, Robert Ferguson's executors and trustees conveyed to a trustee for the defendant, Mary Craig, the lessee's interest under the lease of 1854 (which was treated as having been kept alive after Ferguson's purchase of the fee), in 5 acres and 7 perches of the premises demised thereby; and conveyed to Mary Craig herself the reversionary interest therein. The 5 acres and 7 perches thus dealt with consisted of Sydenham House and its grounds, the premises that had been demised to Kelly, whose lease had been extinguished by the assignment to Ferguson, and the holding known as Seville Lodge, the subject of the sub-lease of 1863, which was and is still in existence. The defendant, Mary Craig, and her trustee now own the entire fee-simple of this portion of the premises, subject only to the sub-lease of 1863. In the meantime the lessee's interest in the several sub-leases made to Arabella Greer and Sarah Greer became vested in the plaintiffs. I have stated the foregoing documents and facts in some detail, as without them it would be difficult to understand either the nature of the cause of action or the grounds on which it rests.

The complaint is that the defendants have recently erected three dwelling-houses and seven shops, fronting the Strandtown—or Belmont-road, which was the southern boundary of the larger parcel of land demised in 1854, and have also constructed a street called Ranfurly-street, running from Strandtown-road alongside Edenvale, consisting of twenty-three private houses; and that they were contemplating and preparing for further building.

The alleged legal injury is that the houses are below the yearly value of £25 and that some of them are used for purposes other than private dwelling-houses. The *damnum* is that the character of the houses being inferior to and the user of some of them being different from what was authorized by the lease of 1854, they seriously injure the plaintiffs' estate in Edenvale and Redcliffe, and have greatly depreciated the value thereof, while the relief sought is in effect an injunction to restrain the defendants from doing any act that would be a violation of the covenants in such lease.

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Now two things are perfectly clear. In the first place, there has been no breach on the part of the defendants of any obligation imposed by that instrument. They represent both the lessor and the lessee; and unless Lord Ranfurly could have himself broken the covenants entered into for his benefit by his tenant, they are free from any liability arising therefrom.

In the second place, there has been no breach of any covenant entered into by the landlord in the sub-leases. Therefore if there be liability by the defendants it does not arise from contract; and I confess, after having given careful attention to the arguments offered on behalf of the plaintiffs, that I find it difficult to formulate the proposition in support of which they were advanced. The averments in the statement of claim give little assistance. They may be summarised thus—Waterson having erected Sydenham House, apportioned the whole of the residue of the lands into nine building lots for the purpose of having villa and other private residences erected thereon; nine sub-leases were made by him, each of which was subject to the clauses and covenants in the original lease; villas were erected by the sub-lessees on some of the lots; Waterson's assignees, by constructing Ranfurly-street, by building houses of an inferior description, and by permitting some of them to be used as shops, have depreciated the value of the sub-leases, have derogated from the grants made thereby, have rendered the premises unsuitable for the user for which they were demised, and have hindered the plaintiffs in the quiet enjoyment thereof. The contention seems to be that Waterson's dealings with the premises demised to him by Lord Ranfurly imposed upon him and his assignees a duty towards his sub-lessees outside

Appeal. and in addition to the contracts made with them. The extent of
 1901. this duty and the time when it arose are not stated definitely in
 GRAHAM the pleadings. The plaintiffs' counsel in the argument limited it,
 v. I think, to keeping the demised premises in the same state in
 CRAIG. which they would be if the covenants in the lease of 1854 were
 Holmes, L.J. still in existence and observed; but the evidence shows that this
 would be of little or no advantage to the plaintiff. What is
 chiefly complained of is that Edenvale—a handsome house with
 gardens and pleasure grounds, now let for £190 a year—is depreci-
 ated in value by the construction of Ranfurly-street, in consequence
 of its privacy being interfered with and the danger of trespass and
 other kinds of annoyance from the new neighbours. Ranfurly-
 street now consists of thirty-three private houses of the annual
 value of £20; but if such value was increased by additional
 expenditure to £25, the houses would be built and used in accor-
 dance with the covenants in the lease of 1854, and yet the damage
 to Edenvale would be the same.

I refer to this, not for the purpose of suggesting that the legal
 right, if it exists, ought not to be enforced, but as tending to show
 that Miss Greer could hardly have been influenced in taking the
 sub-lease and in erecting Edenvale by the existence of these
 covenants.

But the best and most convincing answer to the plaintiffs' arguments is to be found in Waterson's dealings with the demised premises of which I have given a complete account. They present a striking contrast to what was proved in such actions as *Pigott v. Stratton* (1) and *Spicer v. Martin* (2). In the first of these cases Stratton obtained a lease of two plots of ground in the Isle of Wight, containing a restrictive covenant with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on one of them. Stratton then granted an under-lease of the last-mentioned plot, assuring the tenant that he was prevented by the covenants of his own lease from building so as to obstruct the sea view and binding himself in express terms to observe those covenants. He afterwards surrendered his lease, but it was held that the obligation to his sub-lessee still

(1) John. 341; 1 D. F. & J. 33.

(2) 14 App. Cas. 12.

continued. There is absolutely no analogy between this and the present case.

In *Spicer v. Martin* (1) Spicer purchased from Commissioners by different conveyances the fee-simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing restrictive covenants as to the user of the houses. Spicer afterwards granted to Martin a lease of one of the houses containing a similar restrictive covenant by the lessee and a block plan of the houses; and during the negotiations Martin became aware of Spicer's covenants with the Commissioners, and that he had inserted similar covenants in all the leases granted by him. Under these circumstances it was held that although there was no contract, still from the nature of the transaction Martin was entitled to an injunction restraining Spicer from authorizing any of the houses in the block to be used in a way inconsistent with the restrictive covenants.

It is admitted by plaintiffs' counsel that this is the best authority that can be produced in support of their contention; but what assistance does it give in the present case? The nine sub-leases made by Waterson are inconsistent with each other, showing no uniformity of purpose. Having been made by a middleman, it was necessary to make the lettings subject to the clauses and covenants in his own demise; but beyond this there is no reference to it in any of them. The landlord enters into no obligation with any of the tenants other than an ordinary covenant for quiet enjoyment. In three of the under-leases he imposes on the lessees certain express terms of user which not only differ in each case, but are also inconsistent with those in his own lease. I have pointed out that in the first two leases it was contemplated that houses of less value than those stipulated for in the lease of 1854 might be erected by the tenant with the consent of the head landlord. Is it conceivable that while this privilege was given by the middleman to his own tenant he was himself precluded from obtaining from his lessor similar relief as regards the portion of the demised premises that remained on his hands, and which he did not let for

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Appeal. five years? By what process of reasoning can it be inferred that
 1901. Sarah and Arabella Greer, upon whom the middleman imposed no
 GRAHAM express terms of user, were to be in a worse position than the two
 v. previous sub-lessees who had entered into special covenants? But
 CRAIG. if they were at liberty to obtain Lord Ranfurly's consent to devi-
 Holmes, L.J. ations from the user prescribed by him, it could not be argued
 that the same liberty was denied to their lessor.

Look, moreover, at the endorsement on Kelly's lease antecedent in date to the four other sub-leases now vested in the plaintiffs. This endorsement clearly contemplated the erection of cottages that would be a violation of the covenant in the lease of 1854. unless the consent of the head landlord was obtained. Could Kelly afterwards object to his lessor acting on a similar consent in his user of other portions of the demised premises? I find it impossible to draw from the dealings with the premises any other inference than that the only measure of obligation—whether it is called contract or duty is immaterial—on the part of lessor and lessee, in the sub-leases to each other is to be found in the express stipulations of the several instruments; and as the lessor is not prevented thereby from acquiring the head landlord's estate with all the rights attaching thereto, I am of opinion that there is no foundation for the plaintiffs' action, and the appeal must be allowed. I wish to add that some observations of mine in the case of *Craig v. Greer* (1) seem to have been misunderstood. That was an action brought by the present defendants; and, in addition to other relief, it sought to restrain the defendants therein, who claimed under the sub-lease of the 25th December, 1863, from using a house built on the premises thereby demised in a way prohibited by the restrictive covenants in the lease of 1854, of which the defendants had notice. The only defence to this branch of the action was that the plaintiffs by constructing Ranfurly-street and by building the houses facing Strandtown-road had so altered the character of the adjoining lauds as to make it inequitable for them to insist on an observance of the restrictions on the demised premises, and that therefore on the authority of such cases as *The Duke of Bedford v. The Trustees of the British Museum* (2) the

(1) [1899] 1 I. R. 258.

(2) 2 M. & K. 552.

Court would not interfere to specifically enforce the contract, but leave the plaintiffs to recover damages for the breach thereof.

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I discussed this defence, coming to the conclusion that it could not be sustained on the facts; but it was not argued, and it did not then occur to me that it could be argued, that the plaintiffs in constructing Ranfurly-street had incurred a legal liability to the defendants.

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If I had been of this opinion, I should have found it difficult to concur in a judgment giving them the relief they sought.

If I had anticipated the possibility of such an action as the present, I should have made it plain that I did not encourage it, and even, as my words stand, I find in them nothing to suggest it.

Solicitor for the plaintiff: *Samuel Ross.*

Solicitors for the defendant: *Carson & M'Dowell.*

G. Y. D.

ROOKE v. PLUNKETT.

(1900. No. 605.)

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Settlement—Construction—Limitation of real estate—Eldest son—Mortgage by tenant for life and tenant in tail—Child other than son becoming entitled to estate under settlement—Disentailment—Portions for younger children—Power of appointment—Revocation of.

By marriage settlement of 1839 an estate was settled on H. (the husband) for life, remainder to the first and every other son of the marriage successively in tail male. The estate was charged with a sum of money (subject to life interests of H. and his wife therein) in favour of the children of the marriage "other than the son of the marriage who under the limitations of the settlement should become entitled to the lands" in such shares as H. and M. (the wife) or the survivor of them, should appoint, and in default of appointment in trust for such children equally, the shares to be vested at twenty-one or marriage. There was a hotchpot clause in the settlement. There were four children of the marriage—A., J., and C., sons, and one daughter. By deed poll of 1874 (after reciting the death of C. intestate) H. and M. appointed (subject to their life interests therein) the sum of £5000, portion of the trust fund, to the daughter,

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and appointed the residue of the fund to J., the second son. The deed poll contained a power of revocation over the share thereby appointed to J.

A., the first-born son, attained age, and joined with his father in mortgaging the estate for £1100 in 1876, and for £2000 in 1880, the lands having been disentailed by them for the purpose of carrying out the two loans, and to that extent only. J., the second son, joined in the mortgage of 1880 for the purpose of covenanting with the mortgagee that the principal sum of £2000 thereby secured, and interest thereon, should be paid before and have priority over his share and interest in the trust fund charged on the estate. The father, H., covenanted that so long as any money remained due on the mortgage security he would not exercise the power of revocation contained in the deed poll of 1874. A., the eldest-born son, died in 1883, intestate and unmarried. In 1884 H. and J. disentailed the estate. H. died in 1896 (having survived his wife), and thereupon J. became owner in fee of the lands subject to incumbrances. By his will H. purported to revoke the appointment contained in the deed poll of 1874 in favour of J. of the residue of the trust fund (after setting apart £5000, the portion for the daughter), but made no further appointment of it:—

Held, (1) that A. had become entitled to the estate under the limitations of the settlement by reason of joining with his father in charging the inheritance, and that consequently his representatives could not share in the trust fund charged on the estate in favour of the other children;

(2) That the revocation by H. in his will of the share appointed to J. by the deed poll of 1874 was invalid so far as it would prejudice the security of the plaintiffs (who were assignees of the mortgage of 1880), but that without prejudice to the mortgage the revocation was valid as between the parties entitled under the settlement of 1839 to the trust fund; and that the residue thereof (after providing for the £5000 appointed to the daughter of the marriage) went as unappointed to J. and the representatives of C., the share of J. therein being bound by his covenant in the mortgage deed of 1880.

MOTION for judgment on admissions.

By settlement dated the 28th May, 1839, made between Thomas Auchmuty of the first part, Margaret Domville Auchmuty of the second part, Henry Musters of the third part, James Hay and the Rev. William Domville of the fourth part, and Edward Cane and John Greig of the fifth part (being a settlement executed on the marriage of Henry Musters with Margaret Domville Auchmuty), the lands of Bryanstown were (subject to uses to secure pin-money and jointure which determined) limited and appointed to the use of Thomas Auchmuty for life, and after his death to the use of Henry Musters for life, and after his death to the use of the first and every other son

successively in remainder of the marriage, and the heirs male of the body of each such son, every elder son, and the heirs male of his body, taking before any younger son, and the heirs male of his body, with remainder over in default of issue.

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By the settlement a sum of £4000 (the husband's property) and a sum of £5100, three and a-half per cent. consolidated annuities (portion of the wife's fortune), was assigned to the trustees of the settlement (Edward Cane and John Greig), upon trust to pay the interest thereof to Henry Musters for life, and after his death to Margaret Domville Auchmuty for life, and after the death of the survivor of them, upon trust to stand possessed of the said sums in trust for all and every the child and children of Henry Musters and Margaret, his wife, other than the son of the said marriage who, under the limitations thereinbefore contained, should become entitled to the lands of Bryanstown, in such shares and proportions, and subject to such provisos and limitations as the said Henry Musters and Margaret Domville Auchmuty, or the survivor of them, should by deed or will appoint, and in default of such appointment in trust for such child or children, who if a son or sons should attain the age of twenty-one years, or if a daughter or daughters should attain that age or be married, share and share alike. There was a hotchpot clause in the settlement.

Thomas Auchmuty died in 1843.

There was issue of the marriage of Henry Musters and Margaret, his wife, four children, viz.:—Auchmuty Henry Musters, the eldest son, John George Musters, Charles Ralph Auchmuty Musters, and Caroline Musters, all of whom attained the age of twenty-one years. Charles died before 1874 intestate and unmarried.

By deed poll dated the 20th June, 1874, after reciting the death of Charles Musters and an intended marriage between Caroline Musters and the Honourable Thomas Plunkett, and setting out what the funds held in trust for the children were then represented by, Henry Musters and Margaret, his wife, in exercise of the power of appointment vested in them by the settlement of the 28th May, 1839, appointed £5000, portion of

M. R. the trust funds, to Caroline Musters, subject to their prior life-
1901. interests, and further appointed the residue of the trust funds
ROOKE (less the sum of one shilling) to John George Musters, subject
v. to the same life-interests therein. The deed poll contained a
PLUNKETT. power of revocation over the share of the trust funds thereby
 appointed to John George Musters.

By indenture dated the 21st June, 1876, and made between Henry Musters and Margaret, his wife, of the first part, Auchmuty Henry Musters, their eldest son, of the second part, and the then trustees of the settlement of 1839 of the third part, being a mortgage to secure the sum of £1100 advanced by the trustees to Henry Musters and Auchmuty Henry Musters, Margaret Musters postponed her contingent jointure under the settlement to the security intended to be thereby created, and Henry Musters and Auchmuty Henry Musters granted the lands of Bryanstown to the trustees, their heirs, and assigns, subject to redemption on repayment of the said sum of £1100. This indenture was duly enrolled on the 19th September, 1876, as a disentailing deed, the disentailment being expressed to be only to the extent of the loan. The sum of £1100 so advanced by the trustees and secured by the mortgage represented portion of the funds subject to the trusts of the settlement. The balance of the funds was at the date of the execution of the mortgage of 1876 represented by a sum of £3692 6s. 2d. invested on the security of a family charge of £4000 Irish, and a sum of £4153 16s. 11d. invested on a transfer of a mortgage of £4500 Irish, both the charge and the mortgage being incumbrances on the lands of Bryanstown prior to the date of the marriage settlement of 1839. These trust funds or charges upon the lands of Bryanstown in favour of the children, other than the son who should become entitled to the estate under the limitations of the settlement, therefore amounted in 1876 to £7946 3s. 1d.

By indenture dated 18th April, 1880, and enrolled as a disentailing assurance, Henry Musters and Auchmuty Henry Musters barred the entail of the lands of Bryanstown so far as might be necessary for carrying into effect an agreement for a loan of £2000

from one Thomas Warburton. And by indenture of 20th April, 1880, and made between Henry Musters and Margaret, his wife, of the first part, Auchmuty Henry Musters of the second part, John George Musters of the third part, and Thomas Warburton of the fourth part (being a mortgage to secure the sum of £2000 advanced by Warburton to Henry Musters and Auchmuty Henry Musters, together with interest at $5\frac{1}{2}$ per cent. per annum), the lands of Bryanstown were limited to Thomas Warburton in fee, subject to redemption on payment of the sum of £2000 and interest. The mortgage contained a covenant by Henry Musters and Auchmuty Henry Musters to pay the principal sum of £2000 and interest. It also contained a covenant by John George Musters with Thomas Warburton that, so far as related to the shares and interests of him the said John George Musters in the sums of money representing the trust fund for younger children, the principal moneys intended to be thereby secured should be paid before and have priority over the said sums and the interest thereof respectively. By the said mortgage Henry Musters also covenanted with Thomas Warburton that so long as any money should remain due on the security of the mortgage he would not, without the previous consent in writing of Thomas Warburton, his executors, administrators, or assigns, exercise or concur in exercising the power of revocation contained in the deed poll of 20th June, 1874.

Auchmuty Henry Musters died intestate and unmarried on 20th September, 1883.

By disentailing assurance dated 18th March, 1889 (duly enrolled), Henry Musters and John George Musters disentailed the lands of Bryanstown, and thus in the events that happened John George Musters became, and was at the date of the present hearing, the owner in fee of the lands of Bryanstown.

By indenture dated 9th June, 1889, the mortgage debt due to Thomas Warburton under mortgage of 20th April, 1880, and all securities and remedies for compelling payment were transferred to the plaintiffs.

By his will dated the 6th September, 1893, Henry Musters

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purported, in exercise of the power of revocation reserved to him by the deed poll of 20th June, 1874, to revoke the appointment of the residue of the trust funds (after setting aside £5000 portion thereof for his daughter, Caroline Plunkett, then Mrs. Packer), made in favour of his son, George Musters, but did not make any further appointment of the funds subject to the trusts of the settlement of 1839.

Henry Musters died 11th May, 1896, and his will was duly proved by Cartmell Harrison, the sole executor therein named.

Margaret Domville Musters (the wife of Henry Musters) died about 1893.

On 23rd July, 1900, the plaintiffs issued a writ of summons claiming to have the trusts of the indenture of 28th May, 1839, administered by the Court.

By their statement of claim in the action, after setting out at length the other facts of the case, the plaintiffs stated that John George Musters, the owner of the lands of Bryanstown, instituted proceedings in the Court of the Irish Land Commission for the sale of these lands, and that portion thereof had been sold to the tenants, and that the purchase-money was ready for distribution. That such purchase-money was not sufficient to discharge the three charges on which the trust funds were invested and the plaintiffs' mortgage debt of £2000.

The 24th paragraph of the statement of claim was as follows:—
“The plaintiffs are advised that the revocation of the appointment of the residue of the trust funds (after providing £5000 for the said Caroline Packer) in favour of the said John George Musters, deceased, is invalid as far as the plaintiffs are concerned, and that under the terms of the covenant contained in the said mortgage of the 20th day of April, 1880, the plaintiffs are entitled to be paid whatever portion of the said sums of money representing the trust funds would have been payable to the said John George Musters if the said Henry Musters had not revoked or purported to revoke the appointment to the said John George Musters made by the said deed poll of the 20th June, 1874.”

The plaintiffs claimed:—

“1. A declaration that the revocation by the will of Henry

Musters of the appointment made by him by the deed poll, dated 20th June, 1874, was invalid, so far as it would prejudice the security of the plaintiffs' mortgage.

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"2. In the event of its being held that the said revocation was valid to all intents and purposes, a declaration that John George Musters was one of the class entitled to share in the trust funds which became distributable in default of appointment, and that the plaintiffs' mortgage takes priority of the said share of John George Musters.

"3. An inquiry as to how the trust funds subject to the trusts of the settlement of 1839 are now invested.

"4. What persons are now entitled to the trust funds, and in what proportions and in what priorities.

"5. That the trusts of the settlement may be carried into effect so far as may be necessary."

The defendants Alice Plunkett and Ethel Cupiss were sued as trustees of the marriage settlement of the 28th May, 1839, having been appointed new trustees of the same by indenture of the 10th May, 1900.

The defendant James Crofts Ingram was the personal representative of Henry Musters and also of Auchmuty Henry Musters and Charles Musters. This defendant by his statement of defence submitted that the will of Henry Musters operated as a valid and effectual exercise of the power of revocation reserved to him by the deed of appointment of the 20th June, 1874, and that the residue of the funds, subject to the trusts of the settlement of 1839, after providing £5000 for Caroline Packe, went in default of appointment as provided by the settlement. This defendant also submitted that the defendant John George Musters having, at the period when the funds subject to the trusts of the settlement became distributable, become the eldest son of Henry Musters, and as such entitled under the settlement to the land thereby settled, was not entitled to participate in the residue of the trust funds, and accordingly, in the events which had happened, and on the true construction of the indenture of settlement, that this defendant was entitled to receive such residue as personal representative of Auchmuty Henry Musters and Charles Musters.

The defence of the defendant, John George Musters (after

M. R. admitting the execution of the several deeds mentioned in the
1901. statement of claim and referring to the originals when produced
ROOKE for greater certainty) was as follows :—
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“As to paragraph 13 of the statement of claim, this defendant says he executed the mortgage of the 20th of April, 1880, therein mentioned, as a surety only for the mortgagors, Henry Musters and Auchmuty Henry Musters, and that he never received or was paid any portion of the sum of £2000 thereby secured and advanced by the mortgagee, Thomas A. Warburton, to the said Henry Musters and Auchmuty Henry Musters.

“This defendant submits that in the events which have happened, and upon the true construction of the indentures and documents, or some of them, in the statement of claim mentioned, he, as one of the younger children of the said Henry Musters and Margaret D. Musters, is entitled (after providing for the sum of £5000 appointed to his sister, Caroline Alicia Victoria Packe, by the deed poll of the 20th of June, 1874) to (a) the entire residue (less one shilling), or in the alternative to (b) one equal moiety of such entire residue of the trust funds and securities now subject to the trusts of the indenture of settlement, dated the 28th of May, 1839.

“This defendant further submits, in the event of its being declared that the plaintiffs’ mortgage of the 20th of April, 1880, takes priority to any portion of this defendant’s share in the trust funds comprised in the said indenture of settlement of the 28th of May, 1839, that to the extent that the plaintiffs are paid their demand in priority to or out of this defendant’s share in the trust funds, this defendant is entitled to the benefit and transfer from the plaintiffs of the securities given by the said Henry Musters and Auchmuty Henry Musters to the plaintiffs, and to be indemnified to the like extent out of any share of the said trust funds to which the defendant James Crofts Ingram may be entitled as personal representative of the said Henry Musters, deceased.”

O’Connor, K.C., and Herbert Wilson, for the plaintiffs.

Jellet, K.C., and Garrett Walker, for the defendant James Crofts Ingram.

Pakenham Law, K.C., and *Herbert Shaw*, for the defendant
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E. J. Phelps, for the trustees of the settlement of 1839.

[The following authorities (1) were referred to:—*Macoubrey v. Jones* (2); *Collingwood v. Stanhope* (3); *Reid v. Hoare* (4); *Domville v. Winnington* (5); *Ellison v. Thomas* (6); *Saunders v. Boyd* (7); *Adams v. Beck* (8); *Harrison v. Round* (9); *Wyndham v. Fane* (10); *Scarisbrick v. Lord Skelmersdale* (11); *Meyrick v. Laws* (12); *Lord Teynham v. Webb* (13); *Spencer v. Spencer* (14). *Vaizey on Settlements*, p. 1103; *Elphinstone on Deeds*, p. 338; *Radcliffe v. Bewes* (15); *Mattheus v. Paul* (16); *Boyes v. Cook* (17).

THE MASTER OF THE ROLLS (having referred to the pleadings in the case) said:— June 18.

The first question, therefore, is in substance whether under the settlement of 28th May, 1839, Auchmuty Henry Musters, the eldest son of the marriage, was in the events which happened the son of the marriage who under the limitations of the settlement became entitled to the lands of Bryanstown.

(1) See also *Shuttleworth v. Murray* ([1900] 1 Ch. 795). This decision of Cozens Hardy, J., was not cited during the argument, and has since been reversed by the English Court of Appeal on the ground that the rule of construction which has been adopted in the case of provisions for children made by a parent, or person in *loco parentis*, does not apply to the case of a shifting clause, or an exception in the nature of a shifting clause, in limitations of real estate, which must be strictly construed. See report [1901] 1 Ch. 819.—[REP.]

(2) 2 K. & J. 684.

(3) L. R. 4 H. L. 43.

(4) 26 Ch. Div. 363.

(5) 26 Ch. Div. 382.

(6) 2 Dr. & Sm. 111; 1 De G. J. & S. 18.

(7) [1891] 3 Ch. 394.

(8) 25 Beav. 648.

(9) 2 De G. M. & G. 190.

(10) 11 Ha. 287.

(11) 4 Y. & C. Ex. 78.

(12) L. R. 9 Ch. 237.

(13) 2 Ves. Sen. 198.

(14) 8 Sim. 87.

(15) [1892] 1 Ch. 227.

(16) 3 Sw. 328.

(17) 14 Ch. Div. 53.

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The lands being settled on Thomas Auchmuty for life, remainder to Henry Musters for life, remainder to the first and other sons of the latter in tail male, Auchmuty Henry Musters, the first son of the marriage, became on his birth entitled to a vested estate tail in the lands. It is clear, however, that this is not the sort of entitling that is meant. The words must be read as importing actual enjoyment of the property, and so equivalent to "entitled in possession" or "actually acquiring." A mere title in remainder cannot be enough to exclude from the participation in the settled funds, else a different and far simpler form of words would have been used.

In a certain sense Auchmuty Henry Musters never did actually—that is physically—enjoy the estate under the limitations. He predeceased his father after attaining his age. But in 1876 he joined with his father, the protector of the settlement, in disentailing the lands, and raising thereout a sum of £1100 by mortgage of 21st June, 1876. This disentailing assurance was expressed to be only to the extent of the loan, that is, only so far as the transaction at the moment required. The money was raised by both father and son, and must be treated as having been received by or for both, and by and for each. And again in 1880, four years later, father and son again disentailed the property, so far as might be necessary to raise £2000 out of it, and did raise it accordingly, both joining in the receipt as they did in the mortgage, and jointly and severally covenanting for repayment. Subject to this mortgage, the estates stood limited as they were before.

It must be taken that Auchmuty Henry Musters received both these sums of £1100 and £2000 out of the estate; for whether he actually touched the money or not, it could not have been charged upon the inheritance without his positive act. And indeed there can be no doubt that he actually received at least some of it; how much there is no means of knowing.

As I have said, he predeceased his father. Can his representatives or those deriving through him maintain this claim that he was a "child of Henry and Margaret Musters *other* than the son who under the limitations of the settlement of 1839 became entitled to the lands of Bryanstown?"

It is to be observed in considering the effect of the clause in the settlement that it does not speak either of an eldest son, or of younger children in terms, therein differing from many of the instruments which have become subjects of decision. I am not sure, however, that this makes much difference, since the question here is very much the same as that which so often arises when the phrase "eldest son" is used, namely, whether a son, eldest by birth, has or has not enjoyed the estate. If he has not, he becomes a younger child, though first in seniority. If he has, he is in all respects the eldest; and that is the very question here. Did Auchmuty Henry Musters "become entitled" to the estate?

I have said that in one sense he certainly did. He became entitled to it in remainder. That, however, is not what is meant. Did he receive and enjoy it in possession?

His estate in remainder did not vest in possession by the determination of the previous life estate; but he and the tenant for life opened the entail and enjoyed the inheritance just as they chose and without restriction save their own good pleasure. If it were held that Auchmuty Henry Musters was not the son entitled under the limitations of the settlement, it follows that he must have been one of the children who were entitled to share in what is in most settlements, the provision for younger children, and in default of appointment, to share equally. But the dominating principle (if we are not to call it the "truth and honour") of settlements of this sort is equality; not equality under all circumstances, but *prima facie* equality, unless disturbed by parental or other appointment or control, and excluding double portions. In the present case, if there had been no appointment, and if Auchmuty Henry Musters were held to be what I may call a younger child, he (or his representatives, it is the same thing) would have a younger child's share, and also £3100 and enjoyment equivalent to interest upon it for many years besides, out of the estate, which would not be equality.

But then there are cases in which an eldest son has been held entitled to a younger child's share even though he has succeeded to and enjoyed the estate. In such cases, however, his title to the "bulk" of the estate is not directly and immediately under the will or settlement.

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I had to consider a somewhat similar question to the present in a case of *Morton's Trusts* (1) (not reported), and I think also in *Drought v. Drought*, also unreported. I shall read a few passages from my judgment in the former case, in which the eldest son was tenant in tail of the estates in possession, but died an infant before the period of distribution of the portions of younger children.

In my judgment in that case I said: "True, he died an infant, but he is tenant in tail in possession. As such he was entitled to the whole of the rents and profits while he lived, and any accumulations of them would pass to his representatives on his death.

(1) MORTON'S TRUSTS.

(M. R., 1888, March 3).

MOTION that the funds in Court to the credit of the matter, and separate credit of the trusts of the settlement of June 1st, 1839, executed on the marriage of Pierce Morton with Louisa Somerville in relation to the sum of £8000, be allocated, and payments and transfers made as in schedule. By indenture, dated 1st June, 1839, and made between Pierce Morton of the first part, Louisa Somerville of the second part, John Winter, William Plunkett, and John Tatlow of the third part, the Rev. Robert Thompson and William Tatlow of the fourth part (being the settlement executed on the marriage of Pierce Morton and Louisa Somerville), after referring to an indenture of 5th July, 1834, it was witnessed that in consideration of the then intended marriage, Pierce Morton granted to John Winter, William Plunkett, and John Tatlow, and their heirs, certain lands: to hold the same, subject to the trusts of the indenture of 5th July, 1834, and to the incumbrances set forth in the schedule, to the said John Winter, William Plunkett, and John Tatlow, and their heirs, to the use of Pierce Morton, his heirs and assigns, until the marriage and after the solemnization thereof, to certain uses therein declared, for the purpose of discharging several incumbrances set forth in a schedule thereunder written, and the trusts declared by the indenture of 5th July, 1834, and subject thereto to the use of Pierce Morton and his assigns for his life, with remainder to the use of John Winter, William Plunkett, and John Tatlow, their heirs and assigns, during the life of Pierce Morton, to preserve contingent remainders, and after his death to the use that Louisa Somerville and her assigns, in case she should survive her husband, Pierce Morton, should receive a jointure rentcharge of £500 per annum out of the said lands and estate during her life, and subject as aforesaid to the use of Robert Thompson and William Tatlow, their executors, administrators, and assigns, for the term of 200 years, and it was thereby declared that the said term of 200 years was limited as

His wife, had he married under age, would have had her dower and his child would have inherited the estate. If he had lived till twenty-one he could have barred the entail, and this might have happened before the then younger son had attained the age of twenty-one years. If having attained twenty-one, Pierce Edward Morton had died, though unmarried, during the minority of John D'Arcy Morton, having barred the entail, there can be no doubt that John D'Arcy Morton would have been a younger son, and not an eldest within the meaning of the settlement, while if he died without barring the entail (though he might have barred it), it is said that John D'Arcy Morton would have been an eldest

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aforesaid upon trust, to secure the payment of the said jointure rentcharge of £500 as therein mentioned, and upon further trust by the direction in writing of Pierce Morton during his life, and after his decease at the proper authority of the said trustees or trustee for the time being of the said term to raise the sum of £8000 for the daughters or younger child or children of the said marriage, the same to be paid or divided amongst them, if more than one, in such manner, shares, and proportions, and payable at such time or times, as Pierce Morton should by deed or will appoint; and in default of such appointment to be paid to them, if more than one, equally, share and share alike, the share or shares of such of them as should be a son to be paid at the age of twenty-one, and of such of them as should be a daughter at the age of eighteen or marriage, whichever should first happen; but if same should happen in the lifetime of Pierce Morton, then not until six months after his death, with a right of survivorship between them, in case any of the said younger children should die before the time at which his or her portion should vest or become payable; and in case there should be only one younger child, then the whole sum of £8000 should vest in such only child: and the lands (subject to the jointure and charge of £8000, and the other provisions above stated), were settled, in default of appointment, by Pierce Morton among his issue, on his first and other sons successively in tail. About the year 1853 the estate, subject to the trusts of the settlement, was sold, part in the Incumbered Estates Court and part in the Court of Chancery, and the proceeds of the sale (amounting to something over £6000) were edged in Court. The estate was consequently unable to meet incumbrances and charges thereon.

There was issue of the marriage of Pierce Morton with Elizabeth Somerville three sons, viz.:—Pierce Edward Morton, John D'Arcy Morton, and Arthur Pratt Winter Morton; and one daughter, Frances M'Donald Morton. Pierce Morton died 18th April, 1859, without having executed the power of appointment vested in him by the marriage settlement of 1839 over

M. R. son when he came of age. In my opinion, possession of the estate
 1901. as tenant in tail, even by an infant, is the 'actual enjoyment' of
ROOKE it, at least as much as the act of an eldest son, tenant in tail in
v. remainder, who joins with his father to bar the entail and resettle
PLUNKETT. the estate, which is held in all the cases to make him an eldest
 son, conclusively and once for all, on the principle that he has
 actually enjoyed it. And I cannot think that the right of a
 younger child to a portion can depend on whether or not the
 eldest son if tenant in tail in possession attains twenty-one, an
 event no way referred to in the settlement.

"No doubt the construction I have indicated leads to the anomaly

the sum of £8000, or over the lands or any part of the same. Louisa Morton (formerly Somerville) died during the lifetime of her husband, Pierce Morton. The eldest son of the marriage, Pierce Edward Morton, was born in February, 1842, and died in 1861, under the age of twenty-one and unmarried. The second son, John D'Arcy Morton, was born 10th January, 1843.

The third son, Arthur Pratt Winter Morton, was born in 1844, and died in 1871, leaving a widow and two children him surviving.

Frances Morton, the only daughter, was born in 1840, and married Mr. Cruise in 1857. After his death she married Mr. Brown in 1878.

The question arising for decision was as to whether, in the events that had happened, John D'Arcy Morton was entitled to share in the distribution of the fund in Court under the limitations of the settlement of 1839.

On the hearing of the application in February, 1888, there was a sum of £5007 12s. 8d. Government New 3 per Cent. Stock, and £72 18s. 5d. cash, standing to the separate credit of the trusts of the settlement in relation to the sum of £8000, which represented the price given for the estate subject to the settlement after the payment out of Court of certain sums of money to which claims had been declared established.

C. O'Connor, for Mrs. Frances M'Donald Brown, submitted that the fund in Court was divisible in equal shares between Mrs. Brown and the personal representative (when raised) of Arthur Pratt Winter Morton, and that John D'Arcy Morton having become entitled to the estate as tenant in tail on the death of his elder brother, was not entitled to participate.

J. R. Orpen, for John D'Arcy Morton :—

John D'Arcy Morton is entitled to one-third of the fund in Court.

The time at which the class of younger children is to be ascertained is at the period of distribution, that is at the death of the tenant for life: *Spencer*

that John D'Arey Morton would take the estates and also a share as a younger child under the terms of the same instrument. But it would be inaccurate to say that he takes them both as an eldest and a younger son. The estates he takes not as the eldest son,] but strictly as a second son, under the limitation to the first and other sons successively in tail."

Morton's Trusts (1) was decided in 1888, three years before *Saunders v. Boyd* (2), and is, therefore, not the case to which I referred from recollection during the argument. In any case I should, of course, much prefer to rely upon the decision of Mr. Justice Chitty in the latter case, which is in point, unless it can

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v. Spencer (8 Sim. 87); *Domville v. Winnington* (26 Ch. Div. 382); *Ellison v. Airey* (1 Ves. Sen. 111); *Livesy v. Livesy* (2 H. L. Cas. 419); *In re Theed's Settlement* (3 K. & J. 375); Jarman on Wills (4th ed.), vol. ii., pp. 210, 211; *Collingwood v. Stanhope* (L. R. 4 H. L. 43); *Adams v. Beck* (25 Beav. 648); *Ellison v. Thomas* (1 De G. J. & S. 18); *Reid v. Hoare* (26 Ch. Div. 363).

Pierce Edward Morton was in possession of and enjoyed the estate, even though he died under age. He was the eldest son. He died after the period of distribution, and John D'Arey Morton, having been at that period one of the class of younger children, is not excluded from sharing in the portion for younger children by subsequent events. In the present case to hold otherwise would be to deprive John D'Arey Morton of his portion of a younger son by reason of his succeeding to the ownership of the estate, which being insolvent is valueless.

THE MASTER OF THE ROLLS:—

In ordinary cases in a gift by will or deed to the younger children of A B excluding an eldest son, the words "younger children" will receive their natural meaning, and will be construed simply by regard to the dates of birth of the several objects. In such cases the class is determined, and the exclusion of the eldest son is effected at the period of the vesting of the gift to younger children. This I take to be the result of the authorities, with the exception perhaps of *Matthews v. Paul* (3 Sw. 328), as to which the observations of Mr. Jarman, and the criticism of Kay, J., in *Domville v. Winnington* (26 Ch. Div. 382), are of great interest and weight. In that case Sir J. Plumer held that the eldest son was to be ascertained, not at the period of vesting, but at the period of distribution. The case was, however, a

(1) See foot-note.

(2) [1891] 3 Ch. 394.

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be distinguished on the grounds indicated. At page 399 of the report he says: "There might be a question of some nicety in cases of this kind where, on a similar transaction to those which I have mentioned, a small or trifling sum had thus come to the oldest born son. In such a case as that it may be that the sum, if a trifling one, would be disregarded, or that it would be brought into account."

"Small or trifling" is a qualification which must be purely relative; and the learned Judge does not decide that even a small or trifling encroachment upon the bulk of the estate would alter the result if once the entail is barred, so that it is in the power

peculiar one, and I refrain from further discussing it, as the point does not arise here. The general result is as I have stated it.

But in the case of provision by a parent or a person in *loco parentis*, and also in cases like the present, where there is a provision for "younger children" contained in an instrument which limits a family estate to the eldest child, eldest son, or the like, it is well settled that eldest child or son means child or son succeeding to the estate, whether in fact eldest by birth or not. And it is equally well settled that in such cases the time at which the class of younger children is to be ascertained is not the period of vesting, but the period of distribution of the fund.

In *Collingwood v. Stanhope* (L. R. 4 H. L. 43, at page 52), Lord Hatherley says, "The principle of those cases," that is the class of cases relating to settlements, "is this, that the Court with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement), is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be two beacons or landmarks by which the Court has directed itself in steering, sometimes undoubtedly, a very difficult and dangerous course.

"That principle has led to this conclusion that although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that the family estate going to a younger son (which I also ought, indeed, to have mentioned as a leading part of that same system of exposition), the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits

of the tenant in tail, with the concurrence of the protector, to dispose of the whole.

But in truth no such question arises here. In no possible view of the facts can the sums of £1100 and £2000 be regarded as relatively small or trifling. The charges upon the estate for what I may call younger children amounted to £8946 3s. 1d. Out of this is to come in the first instance £5000 appointed to and settled on Mrs. Caroline Plunkett, the validity of the appointment to her being expressly admitted by all parties, without which admission I stated that the case could not proceed in her absence. This leaves £3946 3s. 1d. of the fund for younger

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of the portions provided for the younger children. That being so, it has been further held that the Court will not, notwithstanding very strong words (as they have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And, therefore, it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution, or the portions provided for the children, is that period when the distribution itself is to take place. Then, looking round and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say subsequent to the marriage of the parents, and holding in such case that the younger child has become entitled to a portion may, even though that portion may have been assigned to him, yet if at the period of distribution that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his. He takes the family estate, and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child."

Lord Westbury says in *Ellison v. Thomas* (1 De G. J. & S. 25), "The persons entitled must be ascertained at the time when the money is directed to be raised and divided; and the words of exception," *i.e.* excepting an eldest son, "appear to me to attach upon the son who then answers the description, and to exclude him from the class of persons interested."

Thus a younger son who has become the eldest before the period of distribution is excluded even from a share which had vested in younger children at a time when he filled the character of a younger child. On the other hand, all children other than the eldest at the time when the fund is to

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children ; and even if the whole of it goes to John George Musters or his assigns, it is absurd to speak of a sum of £3100 to be raised out of the inheritance as relatively trifling. I am not sure that the estate was ever able to bear more than that sum over and above the £9000 or so charged upon it. I am quite sure it could not do so now. My reason is that the mortgagee of 1880 seems to have insisted upon the postponement of the claim of John George Musters to his; and also that the present suit is necessary, is brought, and is contested.

So far as the plaintiffs are concerned, since the case was opened in Court, it appears that this claim is not contested. It

be raised and divided are entitled ; and if a second son at that date subsequently becomes the eldest, and succeeds to the family estates, he is still entitled to his share of the provision for younger children. To hold otherwise would be to assume that the period of distribution is not the time to ascertain the rights, or that there may be several periods of distribution, which is contrary to all the cases. In the present case the facts are not exactly like those which are to be found in any of the reported cases, for here the tenant for life, on whose death the shares became raisable, died before the first of the younger children obtained a vested interest. But Mrs. Brown acquired a vested interest on her first marriage in 1857. In *Chadwick v. Doleman* (2 Vern. 528), where under a marriage settlement the father was tenant for life with remainder to trustees to raise £4000 for the portions of younger children as he should appoint ; remainder to his first and other sons in tail, the father appointed the £4000 amongst his younger children, particularly £2600 to Thomas, his second son. Six years afterwards, Thomas, by the death of his elder brother without issue, became under the settlement entitled to the estate as eldest son, subject to his father's life estate. The father then made a new appointment of the £2600 to one of his daughters ; and it was held that it must take effect, the first having been made to Thomas, on the implied condition that he should not become the eldest son. So in *Broadmead v. Wood* (1 Br. C. C. 77) an appointment was made to a younger son by his proper name. He became entitled to the estate charged before the period of distribution, and was held to be excluded, notwithstanding the appointment.

In *Ellison v. Thomas* (2 Dr. & Sm. 111), to which I have already referred, Kindersley, V.-C., had decided that the representatives of an eldest son who had died before the period of distribution, and also a younger son who had become an eldest son at that time, were both excluded from the fund for younger children. But Lord Westbury on the appeal (1 De G. J. & S. 18) held that the representatives of the eldest son were not excluded, because as he died before the period of distribution he was not an eldest, but a younger

would be hopeless to argue that either Auchmuty Musters or Henry Musters, or any one claiming through them, could set up any title whatever against their own mortgagee, so far as the lands were concerned; and so far as concerns the interest of John George Musters, whether he was "the son entitled under the limitations of the settlement to the lands of Bryanstown" or not, it would be equally impossible to contend that he was not bound to provide for the plaintiffs' claim in priority to his own.

The point remaining for decision is this:—The appointment of the residue of the funds made in 1874 was purported to be revoked by the will of Henry Musters. It is not disputed that

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son, within the meaning of the instrument. At page 26 he says, "In the present case one period of time only is referred to, namely, the time when money is directed to be raised. According, therefore, to the literal meaning of the words, one person only is, in my opinion, denoted and excluded from a share in the £13,000; and this construction is strictly in accordance with the spirit and intention of clauses of this nature. For the intention is, that portions shall be provided for all the children except the one who at the time when the portions are payable is entitled to the settled estate. . . That the character of eldest son is to be ascertained at the time appointed for payment of the portions appears to be the clear result of the leading cases of *Chadwick v. Doleman* and *Lord Teynham v. Webb*." I read this judgment in *Ellison v. Thomas* as indicating an opinion that the clause of exclusion of an eldest son operates once, and once only, unless there be express words leading to a different conclusion.

Very clear on the same point is the judgment of Kay, J., in *Domville v. Winnington* (26 Ch. Div. 382), at p. 390. [His Lordship referred to the judgment].

No doubt the learned Judge is dealing there with a case in which he held that the words "eldest son" were to be construed apart from the ownership of the estate. But his decision would be in point in the present case if here the actually eldest son can be treated as having succeeded to the inheritance of the estate, and there is no doubt that he did, assuming there was any estate to inherit. True he died an infant. But he was tenant in tail in possession. As such he was entitled to the whole of the rents and profits while he lived, and any accumulations of them would pass to his representatives on his death. His wife, had he married under age, would have had her dower, and his child would have inherited the estate. If he had lived till twenty-one he could have barred the entail, and this might have happened before the then younger son had attained his age of the twenty-one years. If having attained twenty-one, Pierce Edward Morton had died, though unmarried, during the minority

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he had power to revoke by will, though the plaintiffs rightly contended that no such revocation could be made by him, who had executed the deed of 1880, to their prejudice. This was an unarguable point, and was abandoned. It is said, however, that the revocation, save as regarded the mortgagees, was unassailable; and that the residue, after providing for the plaintiffs' claim, must be held to pass as having been subject to a power, exercised but its exercise revoked, and, therefore, was unappointed. To this contention I see no answer. Subject to the plaintiffs' claims, the residue, after providing for the £5000 appointed to Mrs. Plunkett and secondly to the mortgage of the plaintiffs, passes as unappointed, viz. to the children other than Auchmuty Musters, who, in my judgment, "became entitled" to the estate, and Mrs. Plunkett—that is to say to the representatives of Charles Ralph

of John D'Arcy Morton, having barred the entail, there can be no doubt that John D'Arcy Morton would have been a younger son, and not the eldest, within the meaning of the settlement; while if he died without barring the entail (though he might have barred it), it is said that John D'Arcy Morton would have been an eldest son when he came of age. In my opinion, possession of the estate as tenant in tail, even by an infant, is the "actual enjoyment" of it, at least as much as the act of an eldest son, tenant in tail in remainder, who joins with his father to bar the entail and resetttle the estate, which is held in all the cases to make him an eldest son conclusively, and once for all, on the principle that he has actually enjoyed it. And I cannot think that the right of a younger child to a portion can depend on whether or not the eldest son if tenant in tail in possession attains twenty-one, an event no way referred to in the settlement.

No doubt the construction I have indicated leads to the anomaly that John D'Arcy Morton would take the estate, and also a share as a younger child, under the terms of the same instrument. But it would be inaccurate to say that he takes thus, both as an eldest and a younger son. The estates he takes not as the eldest son, but strictly as the second son, under the limitations to the first and other sons successively in tail. It is, too, conceded that if John D'Arcy Morton had attained twenty-one in the lifetime of Pierce Edward Morton, he would have become absolutely entitled to his younger child's share, even though Pierce Edward Morton died next day, leaving him tenant in tail of the estates under the settlement.

I am of opinion that the period of distribution referred to in the rule is, as regards this settlement, one period; and that it is the time when the first share, and not that of John D'Arcy Morton, became actually payable, and

Auchmuty Musters and to John George Musters. Charles died (it is stated) intestate. If so, his father, Henry Musters, would have been beneficially interested in his share, which would now be vested in equity in the personal representatives of Henry. Legal title must be made, however, by procuring administration to the estate of Charles. The share of John George is bound by his covenant in the mortgage of 1880, and is postponed to the plaintiffs' claim.

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Solicitor for plaintiffs: *H. Rooke.*

Solicitor for defendant, Ingram: *Maunsell & Darley.*

Solicitors for defendant, J. G. Musters: *Whitney & Moore.*

Solicitors for the trustees: *Maunsell & Darley.*

R. W. L.

that he is entitled to participate in the fund for younger children. I may add that if the contention of Mrs. Brown were to prevail, *Ellison v. Thomas* (1 De G. J. & S. 18), is a clear authority that in lieu of John D'Arcy Morton, the personal representatives of Pierce Edward Morton when raised would be entitled to a share, of which John D'Arcy Morton would be beneficially interested in part.

I have hitherto dealt with the case as if there had been an estate, and that it had devolved according to the limitations of the settlement, and no doubt this is the result of the case of *Reid v. Hoare* (26 Ch. Div. 363), a decision which I by no means question. It is, however, on the borders of absurdity to have to discuss the "actual enjoyment" of an estate when there is no estate at all to enjoy, and the rule against double portions, when there are not and never were any portions but one. It is, however, well settled, that where eldest son means the son who inherits the estate, it equally means the son who would have inherited the estate if there had been any to inherit, even if the estate had vanished into thin air; and that tenant in tail in possession means or includes tenant in tail in possession of nothing. I am, however, glad that giving the parties the benefit of the strictest view of the law, there is nothing to compel me to do the great injustice of which I should be the instrument, if forced to hold that John D'Arcy Morton was excluded from this fund. In my opinion he is entitled to one-third of it.

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LOWE v. SHIELDS (1).

Executors — Liability for default of co-executor — Putting assets into sole control of co-executor.

A testator died on the 3rd February, 1897, having appointed J. and M. executors, both of whom proved the will. They realized the assets, and at the end of 1897, or commencement of 1898, three sums of money—(a) a sum of £1330 standing on deposit receipt in the Hibernian Bank, (b) £1500 on deposit receipt with the Antrim Iron Ore Company, and (c) £886 Consols, were called in and paid over to M., who was proprietor of a bank which received money on deposit, paying interest thereon. But these moneys were not deposited in M.'s bank: they were lodged to the credit of M.'s account with the Bank of Ireland, which at the time was overdrawn. A delay of some months occurred in the administration consequent upon a claim against the testator's assets, which on investigation turned out to be unfounded. In January, 1899, M.'s bank stopped payment. It appeared that the testator had several dealings with M.'s bank:—

Held (reversing the decision of the Vice-Chancellor), that the action of J. in placing these sums of money in the sole control of his co-executor was not what an ordinary prudent man would have done with his own money, that handing the money over to M. was not lodging the money with a banker, and that J. was jointly and severally liable with M. for the loss.

By his will, dated the 27th October, 1891, Patrick O'Neill bequeathed everything he died possessed of to his brother, Joseph O'Neill, subject to the payment of certain legacies, amounting in the whole to £760, and he appointed Michael Shields and James Shields executors. Patrick O'Neill died on the 3rd February, 1897, and the will was proved and the gross assets were sworn at £4312 10s. 4d. Joseph O'Neill died in 1894 in the lifetime of Patrick O'Neill, leaving the plaintiffs, Mary Lowe and Mary Connolly, his sole next-of-kin, who brought the action to administer the assets of Patrick against the executors. There were

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

three sums of money with respect to which the question of liability of James Shields arose :—

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1. £1330 on deposit receipt in the Hibernian Bank, which originally stood in the names of Patrick O'Neill and Joseph O'Neill. Joseph O'Neill died in 1894, and after his death, and after the death of the testator, it was transferred into the name of his administratrix, Eliza O'Neill. The amount was realized and paid by the Hibernian Bank to the Bank of Ireland to the credit of the account of Michael Shields, on the 26th November, 1897.

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2. £1500 on deposit receipt with the Antrim Iron Ore Co. in the names of Patrick O'Neill and Joseph O'Neill, and after the death of Joseph it remained in the name of Patrick O'Neill, and Eliza O'Neill as administratrix of Joseph. On the 17th December, 1897, Patrick Shields, the solicitor for the executors of Patrick Shields, gave notice to the Antrim Iron Ore Co. of their intention to call in the £1500. The amount was realized on the 1st February, 1898, and handed over, with the consent of James Shields, to Michael Shields' account in the branch of the Bank of Ireland at Omagh.

3. £886 16s. 7d. Consols, which represented Patrick O'Neill's share in Joseph's assets. They were bought in the names of Mary Lowe, Mary Connolly, and Eliza O'Neill, and were sold on the 25th January, 1898, for the sum of £923 4s. 9d. The amount was handed over to Patrick Shields, as solicitor for the executors, and was lodged by him to the credit of Michael Shields in the Bank of Ireland on the 4th February, 1898.

Michael Shields carried on business at Pomeroy and two other towns in the county Tyrone, by receiving money on deposit receipts for which he allowed interest, but he lodged all the money so received in the Omagh branch of the Bank of Ireland, to the credit of an account in his own name. At the time that these moneys were lodged to his credit his account was overdrawn. His method of carrying on business is described in *Shields' Estate*(1), and the testator had several dealings with Shields' Bank.

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The administration of the assets of Patrick O'Neill was delayed for some time, owing to a claim being made against the assets, which turned out to be unfounded. A correspondence of some length took place between Patrick Shields, as solicitor for the two executors, with the solicitor for the plaintiffs and the secretaries of the companies with whom the moneys were deposited at the end of 1897 and commencement of 1898 for the purpose of getting in the moneys. Shields' Bank stopped payment on the 7th January, 1899, and the money was lost.

The defendant, James Shields, by his defence denied his liability for the default of Michael, and further pleaded that Michael Shields was a banker, and that depositing the money in the hands of a banker did not render him liable.

On the 16th June, 1899, the Vice-Chancellor made a decree for administration, and by the decree gave liberty to the executors to proceed as they might be advised against the Bank of Ireland for the recovery of these sums of money. An action of *Shields v. Bank of Ireland* (1) was brought in the Rolls Court, but on the 21st November, 1900, Porter, M.R., dismissed the action with costs.

The Chief Clerk's certificate found that assets of the deceased to the amount of £3161 3s. 10d. were received by the defendant, James Shields, or by him and his co-executor, Michael Shields, and that James Shields was liable to make good the same amount. James Shields issued a summons to vary the certificate, and on the 15th May, 1901, the Vice-Chancellor gave judgment on further consideration, and held that Michael Shields was alone liable to replace the balance certified to be in his hands. From that decision the plaintiffs appealed.

Ronan, K.C., Wyllie, K.C., and Gaussen, for the appellants:—

If an executor places the assets under the sole control of his co-executor otherwise than in the ordinary course of business he is liable for the loss. The principle is to be found in Lord Cottenham's judgment in *Clough v. Bond* (2). The same principle

(1) See the case reported [1901] 1 I. R. 222.

(2) 3 M. & C. 496, 496.

will be found in *Williams v. Nixon* (1), *Candler v. Tillett* (2), *Trutch v. Lamprell* (3). The act of the executor in parting with the control of money to his co-executor must, in order to be protected, be necessarily done in the regular course of business: *Gasquoine v. Gasquoine* (4).

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T. Pakenham Law, K.C., Matheson, K.C., and Patchell, for the defendant:—

The endorsement of the cheques by the defendant to his co-executor was done in the ordinary course of the administration for the purpose of distributing the assets, and the defendant is not liable for the consequence: *Langford v. Gascoyne* (5), *Gasquoine v. Gasquoine* (4). An executor should not be charged except for an act that amounts to wilful default: *Job v. Job* (6); *Williams on Executors*, 1726. Lodging the money in a bank was always regarded as a prudent act, which an ordinary cautious man would do with his own money: *Churchill v. Hobson* (7); *Chambers v. Minchin* (8); *Attorney-General v. Randell* (9).

The defendant had no reason to suspect the solvency of his co-executor.

FITZ GIBBON, L.J.:—

June 21

We regret that we do not require a reply. A loss must fall on an innocent party, and the only question is whether the owner of the money or one or both of the executors must bear it.

When a testator appoints two executors he declares his confidence in each; either or both may decline; but when both prove the will, the beneficiaries are entitled to the services of two trustees instead of one in protecting and realizing the estate.

In the administration many things cannot be done by two people at the same time. The receipt of money is one of these, and by the settled rule of Chancery either executor may receive money,

(1) 2 Beav. 472.

(2) 22 Beav. 257.

(3) 20 Beav. 116.

(4) [1894] 1 Ch. 470.

(5) 11 Ves. 333.

(6) 6 Ch. D. 562.

(7) 1 Pee. Wms. 241.

(8) 7 Ves. 185.

(9) 22 Vin. Abr. 535.

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and each is answerable only for what he himself receives, and is not answerable for the receipts of his co-executor unless some negligence or default of his own supervenes. But where two executors have undertaken the joint duty of administration, neither can hand over to the other money which has once in law and equity come to the hands or under the control of both jointly, *without sufficient reason*. The word "unnecessarily" is used in a recent case, but it is too wide, because, strictly speaking, it can never be *necessary* for one man to give up the exclusive control of money to another. The true measure of the duty of an executor who has become jointly responsible for the control of assets, as to passing that control exclusively to his co-executor, is, I think, to be found in what an ordinarily prudent man of business would do with his own property under similar circumstances. If an executor dealing with assets exercises less prudence and requires less reason for what he does, or leaves undone, than he would exercise or require in his own case and interest, or if he parts with assets, to his co-executor or to anyone else, which he would keep in his own control if they were his own, he must take the consequences. When money is lost of which he had the control he must show a sufficient reason for having parted with it.

I first consider the case independently of the special defence that Michael Shields was "a banker." How did the money come under the sole control of Michael Shields? There were three sums: (i.) £1330 on deposit receipt in the Hibernian Bank in the sole name of the testator, Patrick O'Neill; (ii.) £1500 deposited with the Antrim Iron Ore Company in the joint names of Patrick O'Neill and Eliza O'Neill, administratrix of Joseph O'Neill; (iii.) £886 Consols in the joint names of certain next-of-kin of Patrick O'Neill. It is conceded that all these sums belonged exclusively to Patrick O'Neill's assets, and that the holders were trustees for Patrick O'Neill at his death, and for James and Michael Shields as his executors afterwards. I assume that the securities were turned into cash payable on demand for the legitimate purpose of distribution, but the mode of doing this is material.

The deposit receipt of the Hibernian Bank represented money already at call. On November 25, 1897, the receipt was endorsed

by both executors, and was sent by Michael alone to the Bank of Ireland, Omagh, with a letter directing the manager to put the proceeds to the credit of his account. A lodgment docket and receipt, each for Michael Shields alone, were duly passed; the interest was added; the whole amount was transferred on November 27, 1897, by the Hibernian Bank to the Bank of Ireland, and the manager of the Hibernian Bank wrote—"Please note I credit you this day £142 19s. 7d., interest on deposit receipt £1330 account, Patrick O'Neill, deceased, received from you this day." There was absolutely nothing in that transaction to indicate any necessity for James Shields abdicating his control over the money. It is the simple case of two executors jointly receiving money, and one of them transferring it without any reason into the sole name of the other.

The other transactions were more complicated, but had exactly the same effect. On December 17, 1897, Patrick Shields solicitor for *both executors*, gave notice to the Secretary of the Antrim Iron Ore Company of the withdrawal of the £1500 and interest thereon invested in the names of Mrs. Eliza O'Neill as executrix of Joseph O'Neill, and Patrick O'Neill, deceased, stating that he was asked *by the executors* to give this notice. On December 17 he sent the receipt of the Antrim Iron Ore Company to Mrs. O'Neill, and asked her to endorse it "to enable *the executors* to draw it." This was done. The Secretary of the Antrim Iron Ore Company wrote to Patrick Shields on January 25, 1898:—"We shall require the deposit receipt to be returned to us, together with a receipt *from the executors* for the principal and interest. We enclose a form of receipt which kindly get signed *by all the parties* across the stamp, and if you will arrange to forward this with the deposit receipt to a bank in Belfast before the 1st proximo, we will hand the cash over on that day in exchange for these documents." It was handed over accordingly, and lodged to credit of Michael Shields alone, and Burrows, the agent of the Bank of Ireland, Belfast, on February 1, 1898, informed him that he had that day advised for credit of his account at the Omagh branch, £1504 15s. 6d., being the amount paid by the Antrim Iron Ore Company on surrender of deposit receipt for £1500, and *the executors' receipt*, both of which he

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Appeal. had from Mr. James that morning. By the same post Burrows
 1901. advised James Shields that he had received the deposit receipt,
 LOWE and had advised the lodgment of the amount to the credit of
 v. Michael. In that case the authority for the act of lodging the
 SHIELDS. money to the sole credit of Michael was a letter written by
 Fitz Gibbon, James in person.
 L.J.

As to the Consols, on December 22, 1897, Patrick Shields wrote to the stockbrokers, Henderson & Co., to have the stock realized, and asked the earliest day at which this could be effected, and what documents or signatures would be required for so doing. On December 23, Henderson & Co. wrote giving full directions, and stating that a power of attorney was necessary. This power of attorney was procured, the Consols were sold, and on January 21, 1898, Henderson wrote to Mrs. O'Neill and Mary Connolly, in whose names the stock had stood, advising the sale of £860 14s. 7d. Consols, which realized £967 15s. 4d. On January 26, they sent to Patrick Shields a cheque for £967 15s. 4d. in favour of Michael Shields and another as executors of Patrick O'Neill. That cheque was endorsed with James Shields' concurrence, and lodged to the credit of Michael Shields alone.

These transactions throughout disclose no necessity or occasion for taking the money from the joint control of both executors and placing it under the sole control of one. We can account for it on one ground only, namely, that James trusted Michael, and left the whole business to him. Therefore, unless Michael Shields being "a banker" makes a difference, there is nothing to exonerate James, and the case falls under the general rule stated in *Trutch v. Lamprell* (1), and *Candler v. Tillett* (2).

I am not prepared to question either of the authorities on which the respondent's counsel mainly relied. *Churchill v. Hobson* (3) is "an old case," but *Gasquicine's case* (4) is not open to that observation. But in the first of those cases, "the joining in the receipt" was "but matter of form," and in the second

(1) 20 Beav. 116.

(2) 22 Beav. 287.

(3) 1 P. Wms. 241.

(4) [1894] 1 Ch. 470.

the co-executors were held "to have followed the regular course of business in administering the estate," and they did no "unnecessary acts." Here, on the contrary, the regular course of business would have been to keep the money on the joint account of both executors until it was distributed by their joint cheques.

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It only remains to consider whether Michael Shields' position as a banker made a difference. This Court decided him to be a "banker" (1) within the meaning of the Irish Bankers Act, 33 Geo. 2, c. 14, because he carried on the business of dealing for profit with money deposited with him at interest. The testator had dealt with him in that capacity. If the money in question had been so deposited with him, either by the testator or by the executors, it might have come within the principle of *Churchill v. Hobson* (2) or of *Gasquoine's Case* (3). But it never was lodged in Shields' bank, even nominally. It never was entered in the books of his bank. It was lodged to the credit of Michael Shields' account in the Bank of Ireland, where he had his own money; it was handed over to him by his brother, not as a banker, but as a co-executor, and the fact that he traded with others as a banker cannot make any difference; if it did it would be enough to discharge any executor from liability for trusting his colleague that the co-executor was a money-dealer, and there would be an end of the authorities which lay down the necessity for justifying the act of abdicating joint control over assets which have reached the hands of two executors.

In this instance the account of Michael Shields was at the time largely overdrawn, and the very act of lodgment *ipso facto* applied the assets to pay his private debt, and was a breach of trust. Would it have been a prudent act on the part of James Shields to hand £3945 10s. 6d. of his own money to his brother under such circumstances, and to say to him—"Lodge that to the credit of your own account in the Bank of Ireland"—without inquiring as to how the account stood, and for no reason except saving trouble in drawing cheques? I cannot think that it would.

(1) [1901] 1 I. R. 172.

(2) 1 P. Wms. 241.

(3) [1894] 1 Ch. 470.

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What happened afterwards was relied on for the respondent, and it was contended that what James did should, as to his liability, have the same effect as if he had distributed the cash among the beneficiaries. The pressure for payment came from beneficiaries; all parties thought that the estate would be distributed in a very short time. The difficulties and delay arose after the lodgment, from a cause for which the executors were not answerable, namely, because a claim was made against the assets which ultimately proved to be unfounded. But reading the correspondence I am driven to the conclusion that, long before the end of it, Michael Shields certainly, and Patrick Shields probably, knew that things were going wrong. The way the correspondence was allowed to drop, the way the beneficiaries were put off without payment or any satisfactory answer, the length of time allowed to elapse without being sufficiently accounted for, the way this unfounded claim was used as a pretext for not paying the beneficiaries, are all circumstances which cannot be left out of consideration in determining the liability of James Shields for the ultimate loss, for they all go to prove that he failed to do the duty of a prudent executor in looking after the assets.

I can come to no other conclusion than that James improperly trusted Michael, that Michael failed James, and that the loss cannot be thrown by James upon the owners of the money. We must allow the appeal, discharge the portion of the order that declares Michael Shields alone answerable, and substitute for it a declaration that the two executors are jointly and severally liable.

WALKER, L.J. :—

I agree. I should be glad if I could be a party to an affirmation of the order of the Vice-Chancellor. It is a case which a Court of Equity has to deal with every day, in which one man is held liable for the wrongful acts of another, though he himself acted honestly. Here we start with this fact, that this trust fund was placed by an executor under the control of his co-executor with a consequent loss. That arose from the default of James Shields; there must be default to make him liable.

Two grounds were put forward by Mr. Law and Mr. Matheson for exonerating him from liability; one was that the funds were invested with Michael Shields, who was a banker, and a person with whom James Shields had lodged money, and that that fact alone exonerated James Shields. That is entirely a question of fact, and the evidence does not support it. No such thing was done. These three sums of money in question were realized in February, 1898, and were placed by James Shields under the sole control of Michael; they were not invested with him as a banker at all. It appears by letters written in the beginning of February, 1898, by the agent of the Bank of Ireland in Belfast that these moneys were placed to the credit of Michael Shields' account in the Omagh branch of the Bank of Ireland, an act which showed that they were not paid to him in the capacity of banker. If he had invested them in the same way in which the £385 was invested, namely, lodged on deposit receipt with P. and M. Shields' bank, the question might have been different; but that was not done. It was placed under the control of Michael, because his brother imprudently trusted him.

The next defence put forward was that after these securities were turned into cash there was a claim put forward against the assets which justified James Shields in leaving these moneys in the hands of Michael until some indefinite period when such claim should be decided. I may point out that these defences are inconsistent. But if such a claim was put forward, and if these funds were turned into cash, although the payments out of them had been prevented for just reason, the funds ought to have been made secure in the joint names in some proper investment pending the determination of these questions. Both defences must fail. *Gasquoine's Case* (1) was strongly relied on by the appellant's counsel, and it was there held that an executor who unnecessarily does an act by which his co-executor obtains sole possession of part of the testator's estate was liable for the co-executor's misapplication. "Unnecessary" was held to mean if it was not done in the regular course of business. In that case certain bonds were handed by two executors to a co-executor who was a stockbroker to turn

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Appeal. them into cash for the purpose of distribution. That is different
1901. in the initial act from the present. There the initial act was done
LOWE in the usual course of business. It appears that James Shields
v. joined in realizing these securities in the months of January and
SHIELDS. February, 1898. That was not known to the beneficiaries, and so
Walker, L.J. far from being an act necessarily done in the administration of
 these assets, I find that everything was done out of the ordinary
 course of business. James Shields simply trusted his brother, as
 in the ordinary course of human nature a man would, and he
 must be held liable for his brother's default.

HOLMES, L.J. :—

A Court is naturally reluctant to impose a serious liability on a defendant whose only fault was that he put too great confidence in his brother; but it must not be forgotten that the legal principle upon which this case is decided exists for the protection of innocent people, whose property may be lost or put in jeopardy by acts and defaults of executors and trustees, which the beneficiaries have no opportunity of preventing. I assume that at the end of 1897 it was reasonable and proper in the due course of administration to realize the securities in which the testator's assets were then outstanding. Lord Justice FitzGibbon has shown in detail that the securities were then in the joint control of the two executors, and how they were converted into money by their joint action. He has also shown that with the assent of James Shields, who theretofore had shared with his brother Michael the control over all the property, the money that had been thus realized was paid into Michael's private bank account, with which James had nothing to do, and of which he seems to have known nothing.

Now, I apprehend the law to be that where an executor, having assets either under his own control or under the joint control of himself and his co-executor, gives them over to his co-executor in such a way as to enable the latter to use or dispose of them as his own, the former will be liable for any loss resulting from his act, unless he can show that it was a necessary, or at least a reasonable, step in the course of administration. I do not think that this proposition is denied; but it is met in two ways.

It is said that the money was to be distributed amongst the beneficiaries in a few days, or at the most weeks. This would undoubtedly be a good reason to hold the money at call; but there would be no difficulty in paying it into a bank to the credit of the two executors. Any bank would gladly receive between £3000 and £4000 to the credit of a current account opened by two respectable men; and there would be no trouble in both signing cheques. Furthermore, it became evident in the course of February, 1898, that by reason of an adverse claim there was no chance of its being possible to distribute the residue without litigation. But James took no step to secure control of the money. He allowed upwards of £3000 of the testator's assets, which he had been the means of placing at the sole disposal of Michael, to remain with him without reason or excuse for almost a year, during which time Michael could have produced the money if it had been demanded.

The second answer given to the plaintiffs' case is that Michael Shields was a banker, and, therefore, a person to be trusted. He had a small bank of deposit in which he received from persons residing in his neighbourhood money in return for deposit receipts, undertaking to pay interest therefor, and requiring rather long notice before withdrawal. It would have been absurd to call in money held by solvent bankers on deposit receipt, because it was wanted for immediate distribution, and without a moment's interval to place it on the same terms in another bank. But it is perfectly clear that it was never given to, or received by, Michael Shields as a banker. There is no entry of it in the bank books, or in any book, except in his private bank account with the Omagh branch of the Bank of Ireland, to the credit of which it was paid, and in which it was at once absorbed by a large overdraft. It often happens that one of two executors is more conversant with business and apparently richer than the other, but this does not justify the latter in handing over the assets to the former. An executor is bound to exercise at least as much care over his testator's property as an ordinarily prudent man exercises over his own.

If two men were jointly interested in £3000 it would be an act of great imprudence for one of them, without any reason, to

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place it at the complete disposal of the other, and allow it to remain so, without question or inquiry, for months. It may be said that this, and even more foolish acts than this, are sometimes done; but that is merely to say that folly is not uncommon. If, in consequence of such imprudence, the person who is guilty of it loses his share of the money, he suffers in his own pocket the penalty. So, too, if being an executor he commits a similar act of folly, he must pay the same penalty by making good the loss arising from his default.

Solicitor for the plaintiffs: *W. J. Venables.*

Solicitors for the defendant: *Reynolds & Hoy.*

R. D. M.

ROBERTS *v.* THE LORD BISHOP OF KILMORE.

(1901. No. 405.)

M. R.
1901.June 6, 7,
20.

*Will—Construction—Devise—Gift over—“Die unmarried and without issue”
—Primary meaning—Context.*

By her will a *testatrix* devised her estate and interest in certain hereditaments in trust for the use of her youngest son H., and his heirs, and (after devising other property in trust for her four youngest daughters, which, on the youngest of them attaining twenty-one, was “to become the property of such of them as shall have remained unmarried in equal proportions,”) she provided that if H. should “die unmarried and without issue” the hereditaments devised to him should go over to her sons E. and M. as tenants in common, “the share of either of them dying unmarried to go and become the estate and property of the survivor.”

H. married, but his wife predeceased him. He had no children.

Held, that the words “die unmarried and without issue” following the gift to H. must be read in their primary signification as meaning “die without ever having been married and without issue”; that, consequently, H. became indefeasibly entitled to the hereditaments, and the gift over in favour of the other sons did not take effect.

ORIGINATING SUMMONS.

By her will, dated 4th July, 1831, Mary Baker Heatly devised and bequeathed to her husband, Isaac Heatly, to be held for the term of his natural life, all her estate and interest in the moiety of the rectorial tithes of Kilpipe and Kiltegan, and immediately after his decease she gave, devised, and bequeathed same to her second and third sons, Edward Heatly and Manuel Heatly, in trust as to her said estate and interest to and for the use, benefit, and behoof of her youngest son, Hawarten Noy Heatly, and his heirs, subject to payment of rent and renewal fines, a reasonable portion of the issues and profits to be applied to the maintenance and education of Hawarten Noy Heatly until the age of twenty-one, with direction as to the accumulation of the surplus. The *testatrix* then devised her interest in a certain dwelling-house in trust

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for her four youngest daughters, and directed that as soon as the youngest (then living) had attained twenty-one it was "to become the property of such of them as shall have remained unmarried in equal proportions." The will then proceeded as follows:—"And if my said son, Hawarten Noy, shall die unmarried and without issue, then I give, devise, and bequeath all my said estate and interest in the rectorial tithes of Kilpipe and Kiltegan to my said sons, Edward Heatly and Manuel Heatly, and their heirs as tenants in common, and not as joint tenants, the share of either of them dying unmarried to go to and become the estate and property of the survivor, and the entire to be subject to and charged with one annuity yearly rent-charge or sum of £30 sterling to be paid to my eldest son, William Montgomery Heatly, during the term of his natural life by equal half-yearly payments, commencing on such 1st day of May or 1st day of November, as shall occur next after the decease of the said Hawarten Noy, and from the decease of the said William Montgomery the said annuity of £30 sterling to be continued payable and paid to such of my four youngest daughters (previously mentioned) as shall up to that period have remained unmarried in equal portions during the terms of their natural lives in like manner and at such times as before directed; and if all my said daughters shall have been married previous to that period, then the said annuity to be continued payable and paid to my second and third daughters Eliza and Julia during the terms of their natural lives in like manner and at such times as above directed, the survivors of the said annuitants in every case to be entitled to the entire sum hereby charged."

Mary Baker Heatly died in 1832, and probate of her will was duly granted to her husband, Isaao Heatly, one of the executors therein named. Isaac Heatly died in 1848. By his will, dated April 12, 1875, Hawarten Noy Heatly devised and bequeathed all his estate and interest in the tithes of Kilpipe and Kiltegan unto his wife, Jane Heatly, for life, and after her decease to his brother-in-law, Alfred George Elliott (now Bishop of Kilmore), his heirs and assigns, absolutely.

Jane Heatly predeceased her husband, Hawarten Noy Heatly, who died on the 13th February, 1900, without leaving issue.

Administration of his estate, with the will annexed, was granted to his sister, Cecilia Elliott.

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Manuel Heatly died 8th April, 1876, having survived his brother Edward, and by his will, dated 25th January, 1865, devised and bequeathed all his interest in the tithes of Kilpipe and Kiltegan in trust for the benefit of the children of his deceased brother, Edward, mentioned in his will. Manuel Heatly died without having been married.

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The plaintiffs, as trustees of the will of Mary Baker Heatly, issued a summons asking for the determination of the following question (amongst others), viz. :—"Whether the moiety of the rectories of the parish of Kilpipe and Kiltegan, specifically devised by the said Mary Baker Heatly in trust for her youngest son Hawarten Noy Heatly, deceased, in fee-simple with an executory devise over, and now represented by a moiety of a yearly tithe rentcharge vested in the plaintiffs as trustees of the said will, was, on the true construction of the will and in the events which have happened, indefeasibly vested in the said Hawarten Noy Heatly at the time of his death or passed under the gift over in the said will mentioned."

The defendant, Abraham Heatly, was one of the children of Edward Heatly, and one of the devisees under the will of his uncle, Manuel Heatly.

The defendant, Hawarten Heatly, was the eldest son and heir-at-law of Edward Heatly, who died intestate.

Fleming, K.C., for the plaintiffs.

Serjeant Campion, K.C., for the Bishop of Kilmore :—

The present subject of contention is as to the title of the deviser, Hawarten Noy Heatly, through whom we claim. This question depends upon the meaning of the words in the gift over on the death of Hawarten Noy Heatly :—if he "die unmarried and without issue." These words must have their literal grammatical construction, and the deviser, having been married, the gift over on his death has not taken effect. The property was indefeasibly vested in him and passes under the devise in his will.

The general result of decided cases (and more especially of

M. R. recent cases) is, that the ordinary and natural sense of these words
1901. is to be adhered to. It is only in a case where there is some
ROBERTS absolute necessity for altering the words that the Court will
2. change "and" into "or": *Long v. Lane* (1). And it is only
BISHOP OF where the context requires it as an absolute necessity that the
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 leaving a widow."

It is only where there is such context that the primary meaning is departed from, and the context must be something showing a contrary intention of the testator himself. There is nothing of the kind here. On the contrary, in the present will the testator on three other different occasions uses this word "unmarried," and it is impossible to contend that on any one of those occasions the word can have any other meaning than its primary and natural meaning of "without having been married." The same word occurring in the same instrument and in reference to the disposition of the same subject-matter cannot be read in different senses.

Unless a literal interpretation would lead to some repugnancy or inconsistency or absurdity the rule of adherence to the natural meaning of the words will not be departed from.

Mere redundancy is not sufficient to enable the Court to depart from *ipsissima verba* of the testator himself. See Theobald on Wills, 612: *Carolyn v. Carolyn* (2); see judgment of Fitz Gibbon, L.J., in *Long v. Lane* (3). *Dalbrymple v. Hall* (4) shows clearly that the practical result of decisions is that in the absence of context, showing contrary intention, the word "unmarried" must be construed according to its ordinary and primary meaning; and see *Heywood v. Heywood* (5). Jarman on Wills, p. 486. *Grey v. Pearson* (6) lays down the broad principle of adherence to the ordinary meaning of words in a document unless compelled to depart from that ordinary meaning in order to avoid repugnancy or inconsistency which defeats the evident intention of a testator. Since *Grey v. Pearson* (6) this rule has been universally followed, and in cases since that decision, where the words "die

(1) 17 L. R. Ir. 11, 24.

(2) 17 L. R. Ir. 25, note.

(3) 17 L. R. Ir. 11, at pp. 34, 35.

(4) 16 Ch. Div. 715.

(5) 29 Beav. 9.

(6) 6 H. L. Cas. 61.

unmarried and without issue" have been read in a different sense from their natural meaning, it will be generally found that there was something in the will under consideration to show that the testator had the wife in view in reference to jointuring or such like, as, for instance, in *Long v. Lane* (1), where there was a power of jointuring given.

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Corvan, for the heir-at-law of Edward Heatly :—

(1) "And" should be changed into "or." The context must determine in each case what meaning is to be attached to the word "unmarried": *Clarke v. Colls* (2); and slight circumstances will be laid hold of as indications of intention that the words "die unmarried and without issue" should be construed in such a way as to give effect to every word in the clause: *In re Sanders' Trusts* (3); *Carolin v. Carolin* (4). There are such indications of intention in this will.

(2) On the construction of the will of Mary Baker Heatly, if either Manuel or Edward Heatly died without having been married, his share of the property is to go to the other brother or his children, if he be dead. That was the intention of the testatrix. Therefore, on the death of Manuel (who never married) his share passed to the heir-at-law of Edward. Jarman on Wills, vol. ii. 1517: *Smith v. Osborne* (5); *Cole v. Sewell* (6); *Aiton v. Brooks* (7).

T. J. Smyth, for Abraham Heatly, one of the devisees under the will of Manuel Heatly :—

There is no rule established since *Grey v. Pearson* (8), that "and" cannot be read "or" in a proper case. It is a matter of the construction of each will. This will was made in 1831, when the older cases were applicable. The word "unmarried" is a word of flexible meaning, and its signification is controlled by the context: *Chant v. Lemon* (9). In immediate juxtaposition to the phrase

(1) 17 L. R. Ir. 11.

(2) 9 H. L. Cas. 601.

(3) L. R. 1 Eq. 675.

(4) 17 L. R. Ir. 25, note.

(5) 6 H. L. Cas. 375.

(6) 2 H. L. Cas. 186.

(7) 7 Sim. 204.

(8) 6 H. L. Cas. 61.

(9) [1900] 2 Ch. 345

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now under discussion there is a gift over on the death of either Edward or Manuel "unmarried"; and this of itself is enough to show that the clause "shall die unmarried and without issue" cannot have been intended to have exactly the same signification as "unmarried," which would be the case if the words "and without issue" are looked on merely as surplusage. Moreover, the testatrix uses the term "remain unmarried" in reference to other gifts in the will, and this is a proper description of one who was not married at any time, and shows that "unmarried" should be construed as "unmarried at the time of death." As the result of the decisions the word "unmarried" has been more often judicially defined in its so-called secondary than in its primary meaning. By adopting the construction contended for a meaning will be given to every word in the clause.

In order to make a will consistent and where the context requires it (as is the case here), the secondary meaning of "dying without leaving a widow" or the alternative of reading "or" for "and" will be adopted: *Clarke v. Colls* (1); *Salisbury v. Bidley* (2); *In re Sanders' Trusts* (3); *In re Sergeant* (4); *Dalrymple v. Hall* (5); *In re Lesingham's Trusts* (6).

Consequently on the death of Hawarten Noy Heatly the moiety of the tithe rentcharge passed to Manuel and Edward Heatly (as tenants in common), and Manuel, having survived his brother Edward, became indefeasibly entitled: *Greenwood v. Percy* (7); *King v. Frost* (8).

June 20.

THE MASTER OF THE ROLLS:—

My judgment in this case can be expressed with moderate brevity.

The word "unmarried" in legal documents, whether wills or settlements, *prima facie* means without having been married, at any rate when used in connexion with a reference to the death of the individual: *Dalrymple v. Hall* (5). This is also the popular

(1) 9 H. L. Cas. 601.

(2) 62 L. T. (N. S.) 789.

(3) L. R. 1 Eq. 675.

(4) 26 Ch. Div. 575

(5) 16 Ch. Div. 715.

(6) 24 Ch. Div. 703.

(7) 26 Beav. 572.

(8) 15 App. Cas. 548.

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sense of the word. But if the phrase is die "unmarried and without issue," as here, a different question arises: for, since if a man have never been married he cannot have lawful issue, the latter words add nothing to the meaning, and the event contemplated is one and not two; whereas if "unmarried" were used as equivalent to "not leaving a widow" or "not having a wife then living," effect would be given to all the words. It may, I think, be taken to be the tendency of modern decision on the subject, where there is no explanatory context, to adopt this interpretation. On this view *Carolin v. Carolin* (1) proceeded, the only words which could have been treated as an explanatory context ("him surviving") not having been noticed; and indeed they could only be used as showing that in that case the devisee might have married and might have had issue, and yet would never have had an indefeasible interest if his children had predeceased him, without issue, even though his children might have married and required the provision. This would go to show affirmatively that the testator did not use the word as meaning "without having been married."

But whatever may be the construction of the words in question, when perfectly unexplained, it is settled that the natural and ordinary meaning will be put upon the word "unmarried" if that construction receive support from the context. In *Long v. Lane* (2), in the Court of Appeal, the presence of a limited power of jointuring was relied on as indicating that the fact of marriage by itself could not be meant to vest the estate absolutely, as it must, if unmarried meant never having been married; for marriage would in that case render the gift over impossible. The same case is an authority for the proposition that when the context requires it, "and" may be read "or," notwithstanding *Grey v. Pearson* (3). It is thus in each case a question of construction.

As to the point I have last mentioned, I am clearly of opinion that there is no reason here to alter the word "and" at all. Its use produces no "repugnancy," "absurdity," or "inconsistency" whatever. Had the testatrix's attention been minutely drawn to the phraseology she was employing, she might have altered it.

(1) 17 L. R. Ir. 25, note.

(2) 17 L. R. Ir. 24.

(3) 6 H. L. Cas. 61.

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But, then, perhaps, she might not. It is there, and I have no right to change it without necessity.

The other question upon the word unmarried is also dependent upon the construction of the words used; and assuming what Lord Justice Fitz Gibbon calls the redundancy or tautology involved in the words "and without issue" would be enough to outweigh the ordinary and natural meaning of unmarried, and to force it to bear a meaning less ordinary and usual—(which, of course, I do not decide)—I have here a context of the very clearest kind: one in which the testatrix has shown what she at any rate means by unmarried. The word occurs in almost immediate contiguity to the phrase I have to deal with in three other passages in the will; and in each and all of them it must bear the natural *prima facie* meaning of the word, without having been married. It does not occur elsewhere in the will.

(1) Such of them (her daughters) as shall have "remained unmarried"—that is the first use of the word "unmarried" in the will. It occurs in a gift of certain property in trust for daughters which when the youngest of them then living attains twenty-one is to become the property of such of them "as shall have remained unmarried in equal proportions." There can be no controversy about that. "Unmarried" there must mean "in a single condition, a spinster."

(2) Then comes the passage in dispute, followed by—

(3) The gift over of the same hereditaments to those who were equally the sons of the testatrix: "the share of either of them dying unmarried to go and become the estate and property of the survivor."

Now, what does "unmarried" mean here? It cannot possibly mean without leaving a widow. The widow could take nothing; and if the meaning were "without leaving a widow," the estate would go over even if the devisee left children and grandchildren. It is impossible to so construe it.

(4) An annuity "to be continued payable . . . to such of my said four youngest daughters as shall have up to that period remained unmarried."

Now, admitting that "unmarried" is a word of flexible meaning, but naturally and primarily meaning never married, it is

plain that this testatrix used it in each and every of the three other places where it occurs in that natural and primary sense; and on every principle of construction it must have that same sense in the other instance of its occurrence unless the context leads imperatively to a different view. So far from that, I think there is great reason for holding that the testatrix actually meant to employ it in the same sense—a sense which would enable the devisee effectually to settle the estate as owner of it, once and for all, on his marriage. The one objection to this construction is that it renders or leaves the words “and without issue” superabundant. But that argument is in the case of wills far from conclusive, as is shown not alone by the judgment of Fitz Gibbon, L.J., in *Long v. Lane* (1), but by Lord Cranworth and Lord Wensleydale in *Grey v. Pearson* (2) in the House of Lords, which in principle is in favour of the decision at which I have arrived.

Thus, I think, “unmarried” in the will means never married, and “and” means and.

Solicitors for the plaintiffs: *Cathcart & Hemphill*.

Solicitor for the heir-at-law of Edward Heatly: *M. Jackson*.

Solicitor for Abraham Heatly: *M. Jackson*.

Solicitors for the Lord Bishop of Kilmore: *Cathcart & Hemphill*.

R. W. L.

(1) 17 L. R. Ir. 24.

(2) 6 H. L. Cas. 61.

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1902.

Feb. 13.
April 16.

HEALY v. ATTORNEY-GENERAL.

(1900. No. 141.)

Will—Perpetual gift to Dominican convent for masses to be offered up in convent chapel—No direction as to celebration in public—Invalidity.

A testator gave the income of freehold and leasehold property, share and share alike, to the Parish Priest of K. and to the Convent of E. for the celebration of the Mass for the repose of the souls of his parents and his own, and a Solemn High Mass to be offered up annually on the anniversary of his death, both in the parish chapel of K. and in the chapel of the Convent of E. The Convent of E. was a convent of the Dominican Order. There was evidence that it was kept open for public worship:—

Held, that the gift, as regards the convent, was not charitable, and was accordingly void as a perpetuity.

- *Kehoe v. Wilson* (7 L. R. Ir. 10), with respect to supposed decision, as a general proposition,—that gifts for Masses for the souls of the dead, though to be celebrated in public, are not charitable—observed upon and explained.

QUESTIONS for the opinion of the Judge.

Dominick Joseph Browne Burke by his will, dated the 27th September, 1845 (amongst other provisions), declared in certain events which happened—"It is my wish and will, and I give and devise that my aforesaid real, fee-simple, freehold, and leasehold property should be applied in the following manner: that is, I give and devise all my aforesaid real, fee-simple, freehold, and leasehold property aforesaid in trust to the Roman Catholic Bishop *in esse* of the Diocese of Clonfert, and to the Parish Priest *in esse* of Killimer Daly, and to the Prior *in esse* of the Dominican Convent of Esker, to Oliver Dolphin, Esq., of Turoe, and unto Michael Joseph Browne, Esq., of Moyne, all in said county of Galway, for the uses, trusts, and purposes following: that is, one-third of the annual income derivable out of all my aforesaid real, freehold, and leasehold property, to be yearly and equally dispensed thus:—one-half of said third to be given, share and share alike, to the Parish Priest of Killimer Daly and to the Convent of Esker for the celebration of the adorable sacrifice of the

Mass for the eternal repose of the souls of my parents, sisters, and relatives, and mine own, and a Solemn High Mass to be offered up annually on the anniversary of my death both in the parish chapel of Killimer and in the chapel of the Convent of Esker; the other half of said third I desire to be dispensed in alms for the relief of the distressed poor of the parish and all those who from comfort have been reduced to affliction and penury. The second third of my said income I give to said trustees, and I desire it to be applied to the support of the free school of Esker Convent. . . .”

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The testator died on the 13th September, 1878.

This was a suit for the administration of his unadministered real estate. The plaintiffs were the Roman Catholic Bishop of Clonfert and the Parish Priest of Killimer Daly. Oliver Dolphin and Michael Joseph Browne were dead. The defendants were the Attorney-General and John A. Burke, the testator's heir-at-law. The proceedings were pending before the Chief Clerk. The property available for the purposes of the will consisted only of fee-simple lands.

An affidavit of Robert G. Warren, Clerk of the Attorney General, stated (amongst other matters) that the Dominican Convent of Esker was a religious Order of men bound by monastic or religious vows. Same was existing at the time of the testator's death, but it had for some years and since his death ceased to exist. The free school of Esker Convent was placed under the Board of National Education in or about the year 1832, and continued as a national school up to the testator's death, and in 1895 was transferred to another portion of the convent buildings. A scheme dated the 8th May, 1893, was framed under the Educational Endowments (Ireland) Act, 1885, for the management of the Madden Endowment for the Diocese of Ardfert, and certain lands were vested in the governors upon trust for the education of Roman Catholic ecclesiastical students in that diocese, and subject thereto upon trust for the intermediate and technical education of Roman Catholic pupils of the diocese. Part of the lands held by the friars of Esker had been assigned to the governors of the endowment. The convent buildings and lands were then in the occupation of St. Joseph's College, Esker, under the control of the governors; the college was primarily intended to prepare students

V.-C. for the Church, but it received students who afterwards joined other
1902. professions. The chapel of the Convent of Esker was then used
HEALY for all the religious exercises of the pupils, and was still as there-
v. tofore kept open for public worship. The school was also carried
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The plaintiffs desired to take the opinion of the Judge as regards the gifts for Masses, and lodged a request for that purpose, stating three questions, the third of which was in these terms—Whether the trust of one-half of one-third of the income of the said real and leasehold property for procuring the celebration of a Solemn High Mass to be offered up annually on the anniversary of the testator's death both in the parish chapel of Killimer and in the chapel of the Convent of Esker is a good charitable trust.

The case was placed in the Judge's list, and by him adjourned into Court.

The Right Hon. The Macdermot, K.C. (with him, *D. F. Browne*), for the plaintiffs :—

The controversy is with respect to one-fourth of one-third only of the income. We admit—(1), that the Esker monks were bound by monastic vows, and, (2), that there is a perpetuity; but (1), the gift is not for the maintenance of the Order, and, is not void as contrary to the policy of 10 Geo. 4, c. 7; and, (2), not only is the chapel one kept open for public worship, but the word “solemn” involves that the Masses were to be said in public, and the gift is therefore charitable. Moreover, on the recent authorities to make it charitable it is not necessary that there should be a direction for the celebration of the Masses in public. The Esker Convent has disappeared; the provision as to the convent chapel is directory only.

[Counsel referred to the affidavit, and to the following cases :—*Kehoe v. Wilson* (1); *Perry v. Tuomey* (2); *Attorney-General v. Hall* (3); *Roche v. M'Dermott* (4); *Bradshaw v. Jackman* (5); *Read v. Hodgins* (6).]

(1) 7 L. R. Ir. 10.

(2) 21 L. R. Ir. 480.

(3) [1896] 2 I. R. 291; [1897] 2 I. R. 426.

(4) [1901] 1 I. R. 394.

(5) 21 L. R. Ir. 12.

(6) 7 Ir. Eq. R. 17.

J. B. Powell, for the defendant, John A. Burke :—

In *Attorney-General v. Hall* (1) the Masses were to be celebrated in public, and on the authority of that case the validity of the gift to the parish priest for Masses in the public church is not disputed. But as regards the other one-fourth the gift is to a monastic Order, and for Masses not to be said in public, but in a convent for the soul of the testator and his relatives; in none of the cases cited do these elements co-exist. The fact that the convent has ceased to exist is immaterial; the question is whether at the testator's death the gift was void and incapable of being legally carried out. Here the gift is for the benefit of the illegal Order, and is void as such. See proviso in section 15 of the Charitable Donations and Bequests Act, 7 & 8 Vict. c. 97. If not void on that ground it is void as a perpetuity not charitable: *Beresford v. Jervis* (2) and *Attorney-General v. Delaney* (3) have never been overruled, and they apply here. See also *McCourt v. Burnett* (4) and *Dillon v. Reilly* (5). *Attorney-General v. Hall* (1) does not decide that a gift for Masses without a direction that they are to be celebrated in public is a charitable gift. Any observations in the judgments in that direction were unnecessary for the decision of the case. In *Attorney-General v. Delaney* (3) and *Attorney-General v. Hall* (1) the gifts were to secular clergymen.

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Morphy, for the Attorney-General :—

Attorney-General v. Hall (1) overrules the view of Palles, C.B., in *Attorney-General v. Delaney* (3). See the judgment of Fitz-Gibbon, L.J., in the former case, p. 446. In *Read v. Hodgins* (6) there was no direction that the Masses were to be said in public. The proviso in section 15 of the 7 & 8 Vict. c. 97 merely provides that nothing in that section shall be construed to render lawful any donation . . . to or in favour of any religious Order, &c. If there is a good charitable purpose it cannot be affected by any disability of the trustee: *Incorporated Society v. Richards* (7).

(1) [1896] 2 I. R. 291; [1897] 2 I. R. 426.

(2) 11 I. L. T. R. 128.

(3) I. R. 10 C. L. 104.

(4) 11 I. L. T. R. 130.

(5) I. R. 10 Eq. 152.

(6) 7 Ir. Eq. R. 17.

(7) 1 Dr. & War. 258.

V. & C. Browne, in reply, referred to *Bradshaw v. Jackman* (1), *Roche*
 1902. *v. M'Dermott* (2), and *Hearn v. Donnellan* (3), as showing that
HEALY the gift was not invalidated by the fact that the Dominican Order
v. was an illegal body.
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April 16.

THE VICE-CHANCELLOR :—

This case has come before me on a memorandum from the Chief Clerk for my direction as to certain questions which have arisen on the will of Dominick J. B. Burke as to charitable bequests therein contained. [His Lordship read the questions.] The 1st and 2nd of these queries are prepared in such loose and general terms that I decline to entertain them in their present form.

The 3rd is sufficiently definite to raise the important question which alone was really in controversy. The portion of the will on which it arises is as follows. [His Lordship read the clause above stated.] This on the face of it is a gift in perpetuity, and on that ground is void unless the trust is a charitable one. Before going into a consideration of the gift in question in the present case, I desire to mention the case of *Kehoe v. Wilson* (4), relied on strongly in the present case, and which came before me many years ago, where I am supposed to have decided as a general proposition that such gifts are not charitable, and are void if given in perpetuity. It has been assumed that I decided in that case that Masses for the souls of the dead, although directed to be celebrated *in public*, are not charitable, and are therefore void. The Master of the Rolls in *Perry v. Tuomey* (5) assumed that I had done so, and considered that my decision was “a deliberate and considered dissent from the view thrown out by the Chief Baron” in *Attorney-General v. Delaney* (6). I find, too, that in a text-book of considerable authority (7) it is laid down as decided by me in *Kehoe v. Wilson* (4), and followed by the Master of the Rolls in *Perry v. Tuomey* (5) that a gift “for Masses for the

(1) 21 L. R. Ir. 12.

(2) [1901] 1 I. R. 394.

(3) *Ibid.*, 402 and note.

(4) 7 L. R. Ir. 10.

(5) 21 L. R. Ir. 480.

(6) I. R. 10 C. L. 104.

(7) Theobald, Wills (4th ed.) 301.

See *ibid.* (5th ed.) 329 [REP.].

souls of the dead, *to be celebrated in public*," is not charitable. The view of the Lord Chief Baron referred to, from which I am supposed to have so dissented, is as follows (1):—"If the will had prescribed that those Masses should be celebrated in public in a specified public church or chapel in Ireland, it would, I confess, appear to me that the bequests would be charitable, as gifts for the public celebration of an act of religious worship, an act which 'tends to the edification of the public congregation.'" So far from dissenting from this view, it is one which I have long held and frequently expressed. It would, indeed, be strange that I should have departed from it in *Kehoe v. Wilson* (2), and that, too, without assigning any reasons for my so doing, and in direct opposition to, and deliberate and considered dissent from, the views of so high an authority as the Lord Chief Baron. It is impossible for me after such a great lapse of time to speak from recollection as to what occurred. The case of *Kehoe v. Wilson* (2), as appears by my note of it, was very complicated and involved a number of questions as to charitable bequests, and, amongst others, was one to the Rev. James Hanrahan, which was objected to on the ground that it was for saying Masses in perpetuity, and was therefore void unless it could be deemed a charitable purpose. The question that appears to have been then principally argued was whether the gift was really one in perpetuity; and there was no further contention, so far as appears, whether the direction as to the publicity of the Masses was sufficient. I find from my own note of the case that the late Mr. James Green, Q.C., for one of the legatees as to whose legacy a similar objection arose, was arguing the question of the validity of his client's legacy, and contending that the gift was charitable, as there had been a sufficient direction for the publicity of the Masses to make it a charitable gift, when counsel for the plaintiff interposed, and said that the question need not be argued further as his client would pay the legacy. This may possibly account for the way in which I dealt with the question when the case was again before me to settle the notes of the judgment. Though I have no personal recollection of what

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(1) I. R. 10 C. L. 129.

(2) 7 L. R. Ir. 10.

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occurred, I think I may say with confidence that I never intended to decide, nor did decide, the general proposition attributed to me.

There was certainly a question there argued whether the requirement of publicity was sufficient, and which, if decided in the negative, would have rendered the general question unnecessary to be considered. All that I did hold was that the charitable nature of the gift had in my opinion not been established.

I can hardly suppose that if I had decided the general proposition that all such gifts were void, irrespective of their publicity, the parties would have acquiesced in my decision of so wide and important a question.

But supposing that I was wrong in this decision, it remains for me to consider what are the terms of the gift in the case now before me. The words here are—"One-third of the annual income derivable out of all my said real, freehold, and leasehold property to be yearly and equally dispensed thus: one-half of said third to be given, share and share alike, to the Parish Priest of Killimer and to the Convent of Esker for the celebration of the adorable sacrifice of the Mass for the eternal repose of the souls of my parents, sisters, and relatives, and mine own, and a Solemn High Mass to be offered up annually on the anniversary of my death both in the parish chapel of Killimer and in the chapel of the Convent of Esker."

Counsel for John A. Burke stated that his client did not press for a declaration that the gift to the Parish Priest of Killimer was void, and it is not necessary for me therefore to make a decision as to it. That to the Convent of Esker therefore alone remains.

This is in terms a gift in perpetuity. Then is it a charitable gift? There is not a word in it of the Masses mentioned being celebrated publicly, or of the annual Solemn High Mass being offered up publicly. The direction that they should be offered up in the chapel of the Convent of Esker does not necessarily require these Masses to be said publicly in that chapel. This, in my opinion, is a fatal defect according to the views I have already expressed, and I cannot therefore hold that this gift is charitable; and I must therefore declare that it is void.

I have not thought it right to go into the consideration of the other questions for the reasons I have before mentioned.

Solicitors for the plaintiffs: *J. H. Walsh & Co.*

Solicitor for the Attorney-General: *R. G. Warren.*

Solicitor for John A. Burke: *James Mulcair.*

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D. M'C. M.

IN RE LEINSTER CONTRACT CORPORATION, LIMITED.

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(1901. No. 62.)

Jan. 18, 21
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Company—Winding up—Issue of paid-up shares—Contract with promoter—Registered contract—Consideration—Companies Act, 1867 (30 & 31 Vict. c. 131), sect. 25.

One of the objects for which a company was established was to adopt a contract made between a promoter and the Company, whereby the Company agreed to allot to the promoter 3500 fully paid shares in consideration of an assignment of the benefit of certain options, businesses, and patent rights, and an undertaking to discharge the preliminary expenses of the Company. The agreement was adopted and registered pursuant to sect. 25 of the Companies Act, 1867, and the shares allotted to the promoter and his nominees. The options, businesses, and patent rights were of no value. On the winding up of the Company, the liquidator contended that there was no real consideration for the agreement, and that the allottees were liable to pay the full amount of the shares.

Held, that the promoter and his nominees were entitled to hold the shares as fully paid.

Baglan Hall Colliery Company (L. R. 5 Ch. 350) followed; *Eddystone Marine Company* ([1893] 3 Ch. 9) distinguished.

ADJOURNED SUMMONS.

This was an application on behalf of the official liquidator of the above-named Company for directions as to whether the shares allotted to the contributories mentioned at numbers 1 to 8 inclusive in the second part of the list of contributories filed by the liquidator in this matter were to be deemed fully paid up, or whether the holders of the said shares were liable to be placed

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on the list of contributories as holders of unpaid shares to the full nominal amount of the capital represented by the said shares.

The summons came on before the Master of the Rolls at Chambers on December 16th, 1901, but was afterwards adjourned into Court, and came on for further hearing on January 18th, 1902.

The following statement of facts is taken in substance from the judgment of the Master of the Rolls:—

The Company was incorporated on August 3rd, 1898, with a nominal capital of £25,000, the total capital issued being 13,285 shares, made up as follows: 3500 shares issued fully paid up to the vendor, Hartnett J. Fuller, and his nominees; 5000 shares issued to the Fish Oil Company, and fully paid for in cash; 1255 shares issued to other parties and fully paid up; 200 shares on which 10s. was paid; 3330 shares on which 5s. was paid. The stated objects for which the Company was formed was to carry on and transact all kinds of promotion business, and what is styled in the prospectus as business of a financial character. The prospectus was dated November 4th, 1898. The first allotment of shares took place on December 3rd, 1898; but the vendor's shares were not allotted until January 16th, 1899. By an agreement, dated November 3rd, 1898, made between the said Hartnett J. Fuller of the one part and the Company of the other part, it was recited that the said Hartnett J. Fuller was entitled to certain options for the purchase of businesses, patent rights, and properties, and it was thereby agreed that the said Hartnett J. Fuller should assign to the Company all his benefits and titles in the said options, patent rights, and businesses, the particulars of which were therein recited to have been set forth in a list or schedule handed to the Company by the said Hartnett J. Fuller, and that the said Hartnett J. Fuller should pay all the costs of the formation and registration of the Company, and it was also agreed that the said Hartnett J. Fuller should pay to the directors by way of additional remuneration for twelve months from the inception of the Company, over and above their remuneration as fixed by the Articles of Association, a sum of £500 to be distributed amongst the directors as they might elect, or at the option of the said Hartnett J. Fuller, to be discharged by the allowance to the said directors or their nominees of 500 fully paid up shares; and also that the said Hartnett J.

Fuller should find responsible subscribers for at least 2000 of the Company's shares, the consideration to be paid by the Company to the said Hartnett J. Fuller for all the foregoing services, payments, and properties, being the allotment to the said Hartnett J. Fuller or his nominees of 3500 shares, to be deemed fully paid up, such allotments to be accepted by the said Hartnett J. Fuller in full discharge of all his claims in relation to the said services or properties.

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This agreement was adopted by the Company on December 3rd, 1898, and duly registered with the Registrar of Joint Stock Companies on December 13th, 1898, the Company having been registered on August 3rd, 1898. As to the options and patent rights which the said Hartnett J. Fuller purported to assign, the liquidator stated that after careful investigation of the books and affairs of the Company, he was unable to find any list, schedule, or particulars of any kind, to indicate what property (if any) passed under the said agreement, and that he believed that no property of the kind did pass. As to the payment of the expenses of the formation, and registration of the Company referred to in the agreement, the liquidator believed that they were paid by or for the said Hartnett J. Fuller; but he had no evidence before him to show that he did actually pay them. As to the payment to the directors over and above their stipulated remuneration as provided for by the said agreement, the liquidator submitted that this was an invalid consideration, and that such payment was improper and illegal, and that as part of the consideration for such allotment it was insufficient to support the same. He believed that this payment was satisfied by the the allotment of shares to the directors. The annual remuneration of the directors, as provided for by the Articles of Association, was 5 per cent. of the certified net profits of the Company distributed among the shareholders for each year. No dividends were ever paid by the Company. The names of the directors, as mentioned in the prospectus, were the said Hartnett J. Fuller, who was to join the Board after allotment, who had since left Dublin; Charles Eyre Coote Townsend, who was engaged in Company promoting, and who subsequently left Dublin; and John C. W. Stanley, of 8 Draper's Gardens, London, engineer. Subsequently, on December 21st,

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1898, Francis M'Donald Robertson, who was manager of the Fish Oil Company, was co-opted a director. He was appointed pursuant to an agreement by the Fish Oil Company in London, to subscribe for 5000 shares if their manager was appointed a director. At a meeting of the Company held on January 16th, 1899, a letter of that date was read by Hartnett J. Fuller, requesting the board to have the certificates for the 3500 fully paid shares which he was to receive made out as as as follows: T. B. C. Hardman, 1200; J. C. W. Stanley, 50; F. L. Robertson, 200; C. E. Coote Townsend, 250; T. B. C. Hardman, 500; F. Murphy, 100; H. J. Fuller, 1200. The vendor's shares were accordingly allotted as requested on that date, and were represented by the contributories 1 to 8 in the second part of the list of contributories, namely: H. J. Fuller, 1200; T. B. C. Hardman, 1450; C. E. C. Townsend, 250; W. B. Hardman, 100; J. C. W. Stanley, 50; F. L. Robertson, 200; H. W. Hardman, 150; F. Murphy, 100.

The connexion of Messrs. H. W. Hardman and W. B. Hardman with the Company arose thus:—The firm of Hardman & Sons, of which they were members, acted as solicitors for the Company and the promoters in connexion with its formation and registration, but the work connected with the formation and registration of the Company was conducted entirely by Townley B. C. Hardman, who was then a member of the firm, and they were not personally aware of the contract entered into between Fuller and the Company, and were unable to explain what businesses, patent rights, and properties were assigned to the Company, or referred to in the agreement. After the formation of the Company Townley Hardman informed them that he had arranged to accept payment of the costs of the formation and registration of the Company in shares, and that 500 fully paid up shares of the Company were to be transferred and paid over to their firm in payment of such costs, and that he would have the said shares transferred to himself and them in the proportion of their shares in the profits of their business. In pursuance of this arrangement, Townley Hardman was credited in the books of the firm with 250 shares, H. W. Hardman with 150, and W. B. Hardman with 100 shares. On January 16th, 1899, two blocks of vendor's

fully paid up shares were by Fuller's directions allotted to Townley Hardman by the Company, the first consisting of 1200 shares and the second of 500 shares. On February 27th, 1899, Townley Hardman transferred 150 of these 500 shares to H. W. Hardman, and 100 to W. B. Hardman. They did not know what consideration was given by Townley Hardman for the 1200 shares, and they were not assigned to and formed no part of the remuneration or property of the firm. The 150 and 100 shares transferred to them were allotted to them in full discharge of their share of the costs of the formation and registration of the Company, and no other payments whatever were made to them in payment or on account of such costs. W. B. Hardman held 100 shares besides, which he bought about the date of the formation of the Company, and on which he paid instalments and calls to the extent of £50. Those facts appeared from an affidavit of H. W. Hardman and W. B. Hardman.

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Townley Hardman afterwards made an affidavit in support of his case, and the liquidator made an affidavit in reply, but it is not necessary to refer to them, as the material facts appear from Townley Hardman's evidence.

On the adjourned hearing Townley Hardman attended for examination. The material parts of his evidence were as follows. He said in answer to the Solicitor-General:—In August, 1898, I knew of a document giving Fuller options. He had an option with Hodges, of Westmoreland-street, also a contract with Bertram, of London, with reference to coal, also I think a third. After Fuller left the documents were lost, and are not forthcoming; I searched for them. We had an option with Bertram to take over a colliery. A report was obtained, for which £32 15s. was paid, and in the result the colliery was not taken over. There was an arrangement with the Sunlight Gas Company as to acetylene gas, but nothing was done as to this. Arrangements were made before by interviews and correspondence between me and this Company. I was acting as solicitor for Fuller. There was not any binding contract; there was an arrangement, but not a contract. The next was with Messrs. Gore and Durban. They had a patent for a new furnace for making calcium carbide. There was a contract in writing with

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Gore and Durban. Messrs. Hubbard & Wheeler, solicitors, had it. They acted for the Leinster Contract Corporation, though not paid. They were also Gore's solicitors. There was no assignment, but an agreement in writing. I think I got it executed. I think there was a contract with Fuller, which was in existence before August, 1898. These are all the "contracts, options, and patents" I can suggest. The Fish Oil Company brought out three or four subsidiary companies. It did not bring out the London Fish Oil and Guano Company, but afterwards lent some money to it. Fuller divided his shares with me. He was bound to provide capital. He asked me to help him, on terms of giving me half of his shares. This was long after the Company was registered. There was no allotment till, I think, December, 1898, or January, 1899. The allotment to me was in January, 1899. I was present on December 3, 1898, when the Company went to allotment. I applied for 500 shares, and subsequently for more in pursuance of an arrangement to help Fuller with his contract. I was to help him, and he would give me some of his vendor's shares. It was left vague. I do not remember that the number was mentioned, save as to the 500 I applied for first. He put the 1200 into my name, that is all I know. After Fuller left, Garde was employed. He came to me and discussed with me the question of these shares. He said that as a solicitor I should not hold these. I said I would give them back if he wished. He came back and told me that he had looked into it, and the Company had the power to take a surrender, and that it would be for their benefit to do so. He said that a board meeting had been called to consider the matter. He suggested a transfer. I executed it and gave it to him to bring before the directors, and sketched a draft resolution.

I got £125 from the Leinster Contract Corporation for journeys to London, partly in connexion with the London Fish Oil Company. There was a further transfer to me of 500 shares fully paid up. This was to pay for the costs of registration and formation of the Company, including what my firm paid for stamps. The costs were never furnished. The shares were divided with my partners.

In reply to Mr. Wakely, the witness said: My instructions

from Fuller to negotiate with the Sunlight Gas Company were before the formation of the Company. I suggested a report should be got as to the patents from Abel and Imray. I am not sure if the report was got. Fuller used to get all the documents he could, his offices were the Company's offices. I have never made a halfpenny out of the Company, I have lost about £3000 in cash by it. I thought the options were good. They had not all been abandoned when Fuller went away. The carbide was still pending. After the formation of the Company these matters were discussed with the directors. Kent & Son was a business in Wexford. Fuller told me that he had an option as well, but I don't know.

Re-examined by the Solicitor-General, he said that there was no investigation as to the title or value of these options before the Company went to allotment on December 3, further than what the directors themselves did.

The Solicitor-General (Campbell, K.C.), and Jefferson, for the liquidator:—

A person to whom shares in a limited company are allotted, must pay cash for them, or give other consideration which must be the subject of a registered contract: Companies Act, 1867, section 25. If the consideration is an illusory or a sham consideration, the registration of the contract does not protect the party: *In re Almada and Tiritto Company* (1); *In re Eddystone Marine Insurance Company* (2); *Ooregum Gold Mining Company of India v. Roper* (3). Here the evidence shows that there were no agreements in writing as to the so-called options, and that the businesses and patents were of no value. The expenses connected with the formation of the Company were incurred before the Company was formed, and therefore the undertaking of Fuller to pay them was no consideration as against the Company. The Articles of Association do not constitute a contract within section 25 of the Act of 1867: *Pritchard's Case* (4); *Firmstone's Case* (5).

(1) 38 Ch. D. 415.

(2) [1892] 3 Ch. 9.

(3) [1892] A. C. 125.

(4) L. R. 8 Ch. 956.

(5) L. R. 20 Eq. 524.

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Wakely, K.C., for Townley Hardman :—

The object of the Company was to deal in options and speculative business. Fuller's contract for the allotment to him of 3500 fully paid shares is mentioned in the prospectus and memorandum of association, and is duly registered under the Act of 1867. The Company were not to pay any cash, but to give Fuller fully paid shares for his undertaking to hand over certain options of uncertain value. Hardman gave consideration. *In re Baglan Hall Colliery Company* (1) and *Baron de Beville's Case* (2) apply. If there was consideration for the contract at the time, the shareholders cannot be put on the list of contributories, because the consideration failed afterwards: *Mege and Angier's Case* (3); Palmer's Company Precedents (6th ed.) Part I., p. 133. The onus is on the liquidator to show that the consideration was illusory: the Court will not inquire into the *quantum* of the consideration, *e.g.* whether what was given for the shares had a cash value equal to the nominal value of the shares: *Chapman's Case* (4).

Leech, for H. W. Hardman and W. B. Hardman :—

The only ground on which Townley Hardman, to whom the 500 shares were allotted direct at Fuller's request could be put on the list of contributories is under section 25 of the Act of 1867. But the agreement with Fuller was duly registered within the time. The allottee is protected if the agreement for the issue of the shares is registered. *Carling's Case* (5); *Elsner and M^r Arthur's Case* (6). Townley Hardman gave consideration for the shares as well as Fuller: *Newport and South Wales Shipowners Company* (7).

H. W. Hardman and W. B. Hardman might be in a better position than Fuller. They took for value: there is no proof of any fraud on Fuller's part or of notice of any fraud. Even if there was no consideration as between Fuller and the Company, or if there was fraud on his part, the application of the liquidator could not succeed. If the agreement is voidable for either reason,

(1) L. R. 5 Ch. 346.

(2) L. R. 7 Eq. 11.

(3) [1875] W. N. 208.

(4) [1895] 1 Ch. 771.

(5) 1 Ch. D. 115.

(6) [1895] 2 Ch. 759.

(7) [1880] W. N. 60.

it should be set aside. The liquidator must approbate or reprobate. Fuller never agreed to take any shares except pursuant to the memorandum of association, and these were to be fully paid up shares. Every shareholder and every creditor had notice that these shares were to be treated as fully paid: *Campbell's Case* (1). The contract cannot be changed: *Anderson's Case* (2).

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Gordon, K.C., and *Collins*, for Stanley.

Day and *Chambers*, for fully and partly paid shareholders, respectively, supported the application.

Jefferson, in reply:—

The Hardmans are in no better position than Fuller: *In re Vulcan Ironworks Company* (3). Townley Hardman was a promoter as well as Fuller, and his partners were affected with his knowledge. The liquidator represents creditors as well as shareholders; he can impugn the agreement, though a shareholder might not be able to do so: *Chapman's Case* (4). The contract which is filed must state the nature of the consideration: *Markham and Darter's Case* (5). Real consideration is necessary, notwithstanding registration: *In re Wragg, Limited* (6). Here there was no consideration, or only a colourable one.

THE MASTER OF THE ROLLS (having stated the facts, and referred to the evidence of Townley Hardman, proceeded as follows):—

Jan. 31.

I feel bound to state that I see no reason to discredit any of Mr. Hardman's statements, and that I accept them as truthful. Fuller has gone away, and has given no evidence as to the transaction in which he played a principal part. Whether the word "absconded" which was used in reference to his absence, is or is not justified, the result is the same.

On the facts, therefore, I find that the shares in question were issued to Fuller under the circumstances stated by Townley

L. R. 9 Ch. 22.

(2) 7 Ch. D. 75.

(3) [1885] W. N. 120.

(4) [1895] 1 Ch. 771.

(5) [1899] 1 Ch. 414.

(6) [1897] 1 Ch. 796.

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Hardman, and that the Company did not, in fact, derive any benefit from any options or patents such as were referred to in the agreement, though it would have done so had the London Fish Oil Company proved a success—that, with hardly an exception, no legal title to any option or patent was possessed by Fuller at the time; but that in a loose sense (which, in my experience, is very frequently the sense in which business men employ language) he had an agreement or understanding with several companies and firms, under which the capital of the Company might (if it chose) have been invested on terms. Whether these terms would have been remunerative is a different question. Some possibly might: others certainly would not. The experiment was not made, save to a very limited extent, and there never was much capital to make it with. The character of the Company, however, is to be borne in mind. It is one of those which are called “Finance” Companies, and in such connexion a financier usually means one who speculates in speculations, and to him no venture seems too wild. To the extent, too, of the costs and expenses of constituting and registering the Company Fuller gave consideration which obviously the Company itself could not dispute.

Still, if the agreement with Fuller had been one which was entered into for the first time after the Company had been registered, as a transaction in the course of its business, it could not, I think, be maintained in this Court as a valid issue of fully paid shares. It would then have been a question for inquiry what value he gave in money or money’s worth; and, as he agreed to become a shareholder, he would have been liable to pay up the difference between what he gave for the shares and their nominal amount.

But the facts here distinguish the case from decisions proceeding on that ground.

The memorandum of association is a very long document. It defines the objects for which the Company is established as: (a) “To adopt and carry into effect (either with or without modification) an agreement which has already been prepared, and which is expressed to be made between Hartnett J. Fuller of the one part and this Company of the other part, a copy

whereof has for the purpose of identification been endorsed with the signatures of two of the subscribers hereto." It goes on to give to the Company general powers to do all sorts of things, which are unnecessary to refer to, but the very first object is to carry out this agreement between Fuller and the Company, to which I have already referred.

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Then comes the prospectus. It refers to this agreement as follows: "The only contracts entered into are: (a) agreement, dated the 3rd day of November, 1898, between H. J. Fuller, Esq., of the one part and the Company of the other part, by which the said H. J. Fuller gives to this Company the benefit of certain businesses and options, and guarantees the subscription of portion of the share capital of this Company, and also undertakes to discharge all the expenses of the registration, formation, and incorporation of this Company, and all incidental expenses up to the first allotment of shares, in consideration for which the Company agrees to allot to the said H. J. Fuller 3500 fully paid shares in the capital of the Company. The said H. J. Fuller also agrees to apply 500 of the shares so to be allotted to him as extra remuneration for the directors during the first year of the Company's existence; (b) agreement, dated the 3rd day of November, 1898, and made between the Company of the one part and the said H. J. Fuller of the other part, whereby the latter is appointed managing director of the Company on terms as to remuneration largely dependent on the profits of the business." This is very candid. Then come the articles of association. The first that is material is No. 3. "The directors shall forthwith execute the agreement mentioned in paragraph (a) of clause 3, of the Company's memorandum of association, with full power, nevertheless, to agree to any modification of the terms thereof respectively, and it is declared that the validity of the said agreement shall not be impeached on the ground that the vendor as promoter or otherwise stands in a fiduciary relation to the Company."

Thus the issuing of these shares as fully paid up cannot in any view of the case be regarded as *ultra vires*. On the contrary, it was not only contemplated, but imperatively required by the very constitution of the Company; and in the absence of fraud

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 1902. been resisted.

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I confess I have not been able to follow the arguments founded on section 25 of the Act of 1867. The issuing of the shares here, pursuant to the agreement, was duly registered. No doubt an agreement, otherwise invalid, will derive no validity from its registration, while an agreement, otherwise valid, may be vitiated by non-registration. But where, as here, the agreement has been registered, and everything has been done which could be done to set it up, unless it is void it is difficult to see what bearing the section has upon the case.

Incorporated as it is with the very creation of the Company, the clause in question must be deemed to have been brought home to the notice of every intending shareholder and every creditor. Never was notice more complete. The shareholders ventured upon this very speculation, and no other. If they had reason to suppose that Fuller and the other directors were engaged in a fraudulent bargain intended to dupe the public, they might have instituted an action against the directors (if that would have availed), or applied to set aside the contract as not binding upon them. But if the contract were set aside as fraudulent and void, it would be quite impossible to hold that the Company was free from it, and yet that Fuller was not—that is, that Fuller was to be held to be a shareholder, not in respect of fully paid shares, but in respect of unpaid shares—a position he never contracted for, and one which obviously he never dreamt of occupying.

In cases where without special authority (such as is the case here), and without full payment in money, or at least money's worth, shares are issued as fully paid, the transaction is in whole or part *ultra vires* and void. Directors have no right whatever to issue such shares under those circumstances. But the case is wholly different when the Company is formed for the very purpose of purchasing something which it is hoped may be worked at a profit or, it may be, sold to advantage. The price, if paid in fully-paid shares or cash, may be extravagant—*Caveat emptor*. The whole thing may be void as being fraudulent. If so, it may be set aside. But on what principle a vendor can be held bound

to accept unpaid shares, and pay them up, if the contract with him be void or voidable, and when his bargain is set aside, I am wholly at a loss to understand in a case where the transaction is *intra vires*. The shareholders cannot approbate and reprobate.

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The case of *In re Almada and Tirito Company* (1) was one where £1 shares were issued at a discount of 18s., i.e. at 2s. each share; and the transaction was set aside, the contributories being discharged from their contract on the ground that it was *ultra vires* on the part of the Company. But these were not founders' shares or vendors' shares, or in any way authorized by the Memorandum of Association, and it was held that registration under sect. 25 of the Act of 1867 was of no avail.

In the case of *In re Eddystone Marine Insurance Company* (2), a Company was registered on the 14th September, 1887, for certain purposes, only £4000 of £20,000 capital being then issued. In 1888 it was proposed to issue the rest of the capital to the public, part of the scheme being that £6000 of the shares should be issued to the existing directors and shareholders as paid-up shares, in consideration of past services. This was in reality a bonus; and the agreement to carry it out was registered under sect. 25. The question on these facts arising in the liquidation was put by Lindley, L.J. (at p. 17):—"Can a Limited Company give its members fully paid-up shares for nothing, so that when the Company is wound-up those shareholders are not liable to pay cash in respect of those shares? The answer to the question of law, to my mind, is clearly that they cannot do it." And the case was decided on the ground that the stipulation was *ultra vires*. Of course that has no bearing on the present case. The case of *The Ooregum Gold Mining Company v. Roper* (3) is to similar effect.

Firmstone's Case (4), which was much relied on, only decided that there was there no contract within section 25, and, therefore, it followed that the transaction under which shares were issued as fully paid was void, the articles there not being a contract within the section. This, of course, is not a proceeding to set aside the

(1) 38 Ch. D. 415.

(2) [1893] 3 Ch. 9.

(3) [1892] A. C. 125.

(4) L. R. 20 Eq. 524.

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transaction. It is based upon the assumption that there is a real Company; and the liability of the partly-paid shareholders must depend upon that same consideration. They are all shareholders; that is, they at least are not discharged from their contract on the ground of fraud. There has been no adjudication that the transaction was fraudulent, nor could such adjudication be obtained in this proceeding; and, on the evidence before me, however full of suspicion, I should not be prepared to decide that the contract was obtained by fraud. In fact, the present proceeding is an attempt to set aside, without pleadings, and on conjecture, a sale under which Fuller was to receive the not very startling amount of £3500. or its equivalent, from the Company, and, when it has been set aside and annulled, to hold him liable on the same contract to pay to the Company £3500: a contract, too, of which the Company have taken the benefit to some extent at least (I refer to preliminary expenses, placing of shares, payments to directors, besides "options," &c.).

Suppose a man has an idea that he can make diamonds out of petroleum (and many ventures are rather like that), and gets up a Company to buy his invention for £20,000 paid-up shares or cash—suppose the invention turns out to be—well, what we might suppose, and the public who, knowing what was the business in hands, rushed in to make fortunes, and found themselves disappointed. If proper steps were taken, and if the initial contract were set aside on the ground of fraud, or *ultra vires*, or any other ground, the ingenious inventor could, doubtless, reap no benefit from his ingenuity; but then it would be impossible to hold him to be a debtor to the Company for £20,000 (if paid him in shares) upon the same contract. If, instead of shares, the payment had been in cash, his liability would be to give back what he got, and there would be an end of it, so far as contract is concerned; and so it must be with the shares. In cases of rescission there must be a *restitutio in integrum*.

Here there has been no rescission, and Fuller and his nominees have never ceased to be shareholders. They hold under a contract not *ultra*, but expressly *intra vires*; and I have no power to substitute for it one which they never made, and never would have made.

In this view, it is unnecessary to go into any question, such as was suggested, founded on equities in favour of Fuller's nominees as distinguished from Fuller himself. They are, in the view I take, all alike. The issue to the nominees of Fuller, under his agreement, is an issue to him, and depends on the same considerations; so that the registration of the agreement protects them all, not by conferring any force upon that which otherwise would have been void, but simply by avoiding the statutory forfeiture, and leaving the transaction to be dealt with apart from it.

I think the principles of the cases of *In re Baglan Hall Colliery Company* (1), and the *Baron de Beville's Case* (2), to both of which I specially referred during the argument, applies here. These shares must be treated as fully paid up.

Solicitors for the liquidator: *Carruthers & Gamble*.

Solicitors for contributories: *V. B. Dillon & Co.*; *T. W. Hardman & Sons*; *Casey & Clay*.

Solicitors for other shareholders: *Häyes & Son*; *Hogan & Sons*.

W. L.

(1) L. R. 5 Ch. 346.

(2) L. R. 7 Eq. 11.

M. R.
1902.

In re
LEINSTER
CONTRACT
CORPORATION

Ross, J. IN THE MATTER OF THE ESTATE OF ELIZA MARY
 1901. KENNEDY AND ANNIE JOSEPHINE KENNEDY,
 June 19. OWNERS; CHARLES ANDREWS, PETITIONER.

Landlord and tenant—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Form of order providing for future payment of the proportion of the rent so redeemed.

Form of order under sect. 33 (4) of the Land Law (Ireland) Act, 1896—in case where a liability to a rent is apportioned and redeemed out of the purchase money, and a right of indemnity exists in respect of such liability—making provision for the future payment of the proportion of the rent so redeemed to the person entitled to the purchase money out of which the redemption is effected.

MOTION by the petitioner for an order making provision for the future payment of portion of a head rent to which the lands were liable, and which had been apportioned between the lands for sale and others, and the part apportioned on the lands for sale had been redeemed, and where the lands for sale were indemnified from the payment of the head rent by the portion of the lands not for sale.

The facts, which were set out in full in the recitals to the order, were shortly:—Benjamin Lockwood was in the month of August, 1812, possessed of the lands of Bishopsland, otherwise Rathordan, Shanordan, Knockbulloge, and Loughnafidora, in the parish of St. Patrick, barony of Middlethird, and county of Tipperary, under a lease from the See of Cashel, customarily renewable on payment of a fine, for the unexpired residue of a term of twenty-one years, subject to a yearly rent. Upon the marriage of his daughter Gertrude with Barton Buckle, he, by a deed dated in the month of August, 1812, assigned or agreed to assign to trustees, in trust for his daughter, the lands of Loughnafidora, freed from all rents and fines payable under the lease, and indemnified therefrom by the remaining portion of the demised lands. Prior to the year 1872 the lands,

the subject of the lease, were held as follows, viz. one undivided moiety of Rathordan, Shanordan, and the lands of Knockbullogue, by James Scargill and Henry Harvey Bingham, the trustees of the settlement of Frederick Martin Scargill; the other moiety by the owners in this matter; and the lands of Loughnafidora by Helena Scargill, indemnified from rent as above-mentioned. By a deed of partition, dated the 30th November, 1872, there was allotted to James Scargill and Henry Harvey Bingham, part of Rathordan and Knockbullogue, to hold for the residue of the term created by a lease of the 18th July, 1871, and any renewal thereof, subject to one full moiety of the rent and fines; and there was allotted to the owners in this matter the other part of the lands of Rathordan, subject to one full moiety of the rent and fines; and there was allotted to Helena Scargill the lands of Loughnafidora, to hold for the residue of the term, and any renewals thereof indemnified against all rent and fines by the lands allotted to James Scargill and Henry Harvey Bingham, and to the owners herein, such portions to bear the said rent in equal shares. There followed mutual covenants by James Scargill and Henry Harvey Bingham, and the owners herein to pay the full moiety of the yearly rent and fines.

By a deed of the 27th October, 1874, the Church Temporalities Commissioners, under the provisions of the Church Temporalities Acts, granted to the owners herein and to James Scargill all the lands, to hold the same for ever, subject to the perpetual yearly rent of £189 10s. 9d., which was subsequently, by deed poll of the 19th December, 1896, reduced to the sum of £150 19s. 2d. In the year 1880 Annie Josephine Kennedy, one of the owners herein, purchased the lands of Loughnafidora. Upon the sale of the owner's moiety of the lands of Rathordan, and of the lands of Loughnafidora, it became necessary to apportion of the rent of £150 19s. 2d.; and by an order made in this matter on the 12th December, 1900, the rent was apportioned as follows, viz. £66 4s. was put on the divided moiety of Rathordan, for sale in this matter; £20 8s. 2d. on the lands of Loughnafidora, also for sale in this matter; and £64 7s. on the other moiety of Rathordan and Knockbullogue, then the property of Frederick Martin Scargill; and it was ordered that the two former apportioned parts of

Ross, J.
1901:

In re
KENNEDY'S
ESTATE.

Ross, J. the rent should be redeemed. These proportions were based on
 1901. the Government valuation of the several lands.

In re
 KENNEDY'S
 ESTATE.

When the lands had been sold, and the redemption prices and incumbrances paid, there was a balance of the purchase money coming to the surviving owner, Ellen Kennedy, and it became necessary that an order should be made under section 33 (4), of the Land Law (Ireland) Act of 1896, declaring her entitled to the portion of the rent apportioned on Loughnafidora, which had been redeemed out of the purchase money of those lands, and against the payment of which those lands were indemnified.

It was agreed by the parties on the hearing of the motion that the rent of £20 8s. 2d should be so divided between the lands for sale and Frederick Martin Scargill's lands, that the latter should only be liable to one moiety of the rent of £150 19s. 2d.

Stubbs, for the party having carriage.

A. C. Meredith, for the owner.

Molyneux Barton, for Frederick Martin Scargill.

Ross, J, made an order, which, after reciting the facts above mentioned, proceeded as follows:—

“AND whereas, in pursuance of the said order, the said apportioned rents of £66 4s. and £20 8s. 2d. have been redeemed, and it has been ascertained by the Land Judge that, except for such apportionment and redemption as aforesaid, the moneys paid to effect such redemption would have been payable, and would have been paid to the said Ellen Kennedy in respect of the surplus proceeds of such sales, after the discharge of incumbrances affecting the lands sold in this matter; and whereas the liability of the said Ellen Kennedy and the said lands to the said rent having been redeemed out by the purchase-money, and a right of indemnity in respect of such liability existing as aforesaid, it has been ascertained by the Court, and the parties by their counsel so consent, that the proportion of the said rent so redeemed as aforesaid, to which the said Ellen Kennedy is entitled, is the sum of £11 2s. 7d., which, together with the said sum of £64 7s., so as aforesaid apportioned on the said divided moiety of the lands of Rathordan and the lands of Knockbullogue, amount to one moiety of the said rent of £150 19s. 2d., which, under the provisions of the said deed of

30th November, 1872, the owners of the said last mentioned lands are subject, whereupon, &c.

“The Court doth declare, in pursuance of the provisions of sub-sect. 4, sect. 33 of the Land Law (Ireland) Act, 1896, that the said Ellen Kennedy, her heirs and assigns, are entitled to receive out of the divided moiety of the lands of Rathordan, containing £341 acres 1 rood and 15 perches, and out of the lands of Knockbullogue, containing 62 acres 3 roods 25 perches, situated in the barony of Middlethird, and county Tipperary, the annual sum of £11 2s. 7d., to commence from the 22nd May, 1901, and to be payable in four quarterly payments, on every 1st February, 1st May, 1st August, and 1st November in every year; and that the said divided moiety of the lands of Rathordan, and the lands of Knockbullogue, in the barony of Middlethird, and county Tipperary, shall stand charged with the payment of the said annual sum of £11 2s. 7d., to be payable in manner aforesaid to the said Ellen Kennedy, her heirs and assigns.”

Ross, J.
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ESTATE.

Solicitors having carriage: *Reid & MacNab*.

Solicitors for the owner: *White & White*.

Solicitors for F. M. Scargill: *Vincent & Beatty*.

W. C. S.

MAGEE v. MARTIN (1).

Will—Estate in realty—Estate in special tail—Condition.

Appeal.
1902.

May 1, 2, 8.

A testator, after leaving certain annuities to his wife and daughter, which he charged on his landed property, left his lands (held in fee-simple) to his son R. J. M., with the exception of what his wife was to get; “but the said R. J. M. shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female, of proper conducted parents” :—

Held (reversing the decision of the Vice-Chancellor), that R. J. M. took an estate in special tail.

SUMMONS for the determination of the question whether Robert John Magee took an estate in special tail under the will of William Magee, or an estate in fee-simple.

(1) Before LORD ASHBORNE, C., and FITZ GIBBON, WALKER, and HOLMES,
L.JJ.

Appeal.
1902.

MAGEE
v.
MARTIN.

William Magee by his will, dated the 30th September, 1880, bequeathed to his wife an annuity of £50 a-year charged upon his property in the county of Cavan, and to each of his five daughters £10 a-year charged on the same property. The will proceeded as follows:—"I also leave and bequeath to my son, Robert John Magee, the place I now live in Drumconnor, with stock and crop, with exception of what my wife, Mary Elinor Magee, has to get, together with Derryginny, Tiercahin, and Cullion, in the county Cavan, by paying all the aforesaid jointures year and yearly; and the said Robert John Magee is to collect all my outstanding debts. But the said Robert John Magee shall never have power to sell or mortgage any of those lands, nor no person to inherit any of them unless a lawful issue of a male child got by marriage with a respectable Protestant female of proper conducted parents."

William Magee died on the 2nd December, 1889, and Robert John Magee went into possession. Robert John Magee died on the 28th April, 1901, unmarried, having by his will, dated the 12th January, 1898, left all his property to his five sisters as joint-tenants; and he appointed Susan Martin, one of his sisters, executrix, by whom the will was proved. David A. Magee, as heir-at-law of William Magee, claimed to be entitled to the lands on the failure of the estate tail, which he contended Robert John Magee took under the will of William Magee. The lands were freehold.

On the 28th February, 1902, the Vice-Chancellor decided that Robert John Magee took an estate in fee in the lands, and David Magee appealed.

S. L. Brown, K.C. (with him *Fetherstonhaugh, K.C.*, and *Pringle*), for the appellant:—

We contend that Robert John Magee took an estate in special tail. A gift to a man and the heirs of his body by a particular wife or a wife of a particular name is valid, and creates a special estate tail: *Preston on Estates*, 412. The intention of the testator was to send his estate down through his male descendants sprung from Protestants, and he did not intend to give an absolute gift to Robert John Magee. A devise to A, if he marries a fit and

worthy gentlewoman, and has issue male to such issue male and their male descendants, amounts to a devise in special tail : *Clinton v. Duke of Newcastle* (1). The condition against alienation is void, yet the rest of the devise is good ; *O'Hanlon v. Unthank* (2).

[Counsel also referred to *Thompson's Estate* (3) ; *Crumpe v. Crumpe* (4) ; *Richards v. Davies* (5) ; *Key v. Key* (6).]

Matheson, K.C., O'Connor, K.C., and H. Wilson, K.C., for the respondent :—

The condition against alienation or mortgaging is void as being repugnant to an estate in fee, and we submit this other condition is void also. It would be difficult to work this out as an estate in special tail. If the appellant's contention is right this estate would be an estate in special tail male in the first generation, and in special tail general afterwards.

The judgment of the Court of Appeal was delivered by—

May 8.

WALKER, L.J. :—

The question in this case arises on the will of William Magee, by which, after certain legacies, the testator devised some freehold lands to his son Robert in the following words. [The Lord Justice read the clause in the will.]

The question we have to decide is whether an estate in special tail was given to Robert J. Magee under the words I have read. It is settled that such an estate may be created by a reference to the particular wife, by whom the issue of the body are to be procreated, and she may be described by rank or religion, or requisition of good conduct, or any other special circumstance which ascertains her : 2 Preston on Estates, 412. It is also settled that if an estate tail be created, the Court cannot regard the circumstance that the intention of the testator may be in part defeated by the barring of the entail. The Court must find the existence of the entail by applying settled canons of construction, and the

(1) [1902] 1 Ch. 34.

(2) I. R. 7 Eq. 68.

(3) 16 Ir. Ch. Rep. 228.

(4) [1900] A. C. 127.

(5) 13 C. B. (N. S.) 861.

(6) 4 D. M. & G. 73.

Appeal. barring of the entail is a legal incident, and cannot control the
 1902. effect or construction of the words used.

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v.
MARTIN. It is also established that though an estate in fee would be
 Walker, L.J. created before the Wills Act by the imposition of charges on the
 estate, that makes no difference as to finding an estate tail under
 the language because charges may still exist on that estate: *Good*
v. Good (1). Here the Wills Act, too, *prima facie* confers an estate
 in fee, but that must yield to a contrary intention appearing. The
 difficulty in the case (and I think it is not free from difficulty) is
 whether the words beginning: "But the said Robert J. Magee
 shall never have power to sell," &c., are words which attempt to
 limit the *jus disponendi* and descendible quality of the estate, an
 estate in fee having been first *prima facie* conferred, or whether
 they on their true construction are not really words of limitation,
 and define the manner in which the estate is to descend, and the
 issue who are to take.

It is, I think, clear that words, which are in form a condition,
 may be construed as words of limitation. In *Page v. Hay-*
ward (2), Nicholas Searle by his will devised to his niece, Mary
 Bryant, and the heirs male of her body upon condition and pro-
 vided that she intermarry with, and have issue by, one surnamed
 Searle. This was held to be an estate in special tail. In *Mortimer v.*
Hartly (3) a testator devised his lands on this express and unalter-
 able condition that neither he nor his heirs to the third generation
 shall have power to sell or mortgage; this was held to be an
 estate tail. I read the words in the will in this case equivalent
 to—"I direct that all persons inheriting my estate shall be lawful
 issue of a male child got by marriage with a respectable Protestant
 female of proper conducted parents." Then a direction that he
 shall not sell or mortgage works in with that as evidencing the
 intention to continue the devolution of the estate in such issue,
 and the observations of the Master of the Rolls in *O'Hanlon v.*
Unthank (4) can be called in aid in this connexion, though that
 case itself was a very plain one on other grounds. Upon the
 whole, I think that the intention of the testator, as evidenced by

(1) 7 Ell. & Bl. 295.

(2) 2 Salk, 570.

(3) 6 Ex. 47; 3 De G. & Sm. 316.

(4) 1. R. 7 Eq. 68.

his words, is best carried out by holding that R. J. Magee took an estate in special tail male, and therefore that the the appeal must be allowed.

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HOLMES, L.J. :—

I agree with what has been said by Walker, L.J., whose judgment I have had an opportunity of reading.

If the testator after giving the lands to his son, Robert John Magee, had added in a subsequent part of the will that they were to be inherited by the lawful male issue of such son by a Protestant wife born of well-conducted parents, it could not, I think, be argued that this did not confer on Robert John Magee an estate in special tail male. But this is in substance what is said. At first I was disposed to think that the meaning of the words was that every taker of the estate was to have a Protestant mother, but on consideration I am of opinion that on the true construction the marriage mentioned is the marriage of Robert John Magee himself, and I also hold that "a lawful issue of a male child" is merely a clumsy mode of saying "lawful male issue."

The prohibition of sale and mortgage can be accounted for by the nature of an estate tail as understood by unlearned testators. Such an estate cannot be conveyed or otherwise disposed of while the entail continues, and it is not to be assumed that the testator contemplated that it could or would be altered by a legal process into an estate that carried with it an absolute power of disposition.

Solicitors for the plaintiff: *Falls & Pringle.*

Solicitors for the defendant: *Allen & Halpin.*

R. D. M.

V.-C.
1902.

June 5.

L'ESTRANGE v. L'ESTRANGE.

(1900. No. 611.)

Will—Construction—Gift of residue without words of severance—Power of advancement—Joint tenancy or tenancy in common.

A testator devised the residue of his property to trustees for the benefit of six of his children, with power to his said trustees to advance such sum or sums, as they might think fit, for the education and advancement in life of his said children :—

Held, that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that, consequently, a tenancy in common was created in the residue.

ADJOURNED SUMMONS.

By his will, dated the 26th March, 1879, Thomas L'Estrange disposed of his residuary estate in the following manner :—" As to the rest, residue, and remainder of my property, real, freehold and chattel, I devise and bequeath the same in trust to my beloved wife, Anne L'Estrange, and my brother-in-law, Timothy Mitchell, of Binvilla, in the county of Galway, for the benefit of the rest of my children, namely, Annie, Bridget, Margaret, Sarah, Patrick, and Mary, with power to my said trustees to advance such sum or sums of money, as they may think fit, for the education and advancement in life of my said daughters and my son Patrick."

The said Thomas L'Estrange died on 26th March, 1879, leaving the following children him surviving, viz. Annie L'Estrange, Daniel L'Estrange, one of the defendants, Bridget Clara L'Estrange, one of the plaintiffs, Thomas L'Estrange, Margaret L'Estrange, another of the defendants, and the other plaintiff, Mary H. L'Estrange.

The said Annie L'Estrange and Sarah L'Estrange died prior to the date of the present proceedings intestate and unmarried. The said Bridget L'Estrange was married in May, 1886, to J. S. Valley.

The question in the present case was, whether the residuary estate passed under the will to the devisees as joint tenants or tenants in common.

Motony K.C., for the plaintiffs :—

V.-C.
1902.

The gift of the residue “for the benefit of” the children unquestionably created a joint tenancy, there being no words of severance: *Williams on Executors* (9th ed.), 1326; *Jarman on Wills* (5th ed.), 1117; *Newill v. Newill* (1); *Newsom’s Trusts* (2). To cut down a joint tenancy the language must be clear and unequivocal: *Jury v. Jury* (3). There is no such language here. As regards the clause giving power to the trustees to advance sums for the maintenance and education of the children, it must be borne in mind that the children were all minors at the time of the death of the testator; the Conveyancing Act had not been passed; and it was to prevent an accumulation of the income of the residue that the testator gave this power to the trustees. He was in this way guarding against any mistake as to the nature of the gift already made. The advances were not to be made out of the shares of the children in the residue, which the testator treated as a joint fund to be given to them jointly.

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Samuels, K.C., and *Arthur C. Meredith*, for Daniel L’Estrange :—

The power of advancement given to the trustees is inconsistent with a joint tenancy. In marriage articles words, which otherwise would create a joint tenancy, have been held to create a tenancy in common, as during the minority of the children no use could be made of their portion for their advancement, because the joint tenancy could not be severed: *Taggart v. Taggart* (4); *Mayn v. Mayn* (5). The principle is applicable to the case of a will containing a power to advance. The Court seizes hold of the slightest evidence of an intention to sever. The word “participate” was held to create a tenancy in common in *Robertson v. Fraser* (6). In *Gant v. Laurence* (7) a power of apprenticing was held to have the effect of excluding a joint tenancy. The power given to the trustees to advance sums, not merely for the

(1) L. R. 7 Ch. Ap. 253.

(2) 1 L. R. Ir. 373.

(3) 9 L. R. Ir. 207.

(4) 1 Sch. & Lefroy, 84.

(5) L. R. 5 Eq. 150.

(6) L. R. 6 Ch. Ap. 696.

(7) Wightwick’s Rep. 395.

V.-C. maintenance and education, but also for the advancement in life,
 1902. of the children, shows an intention on the part of the testator
L'ESTRANGE to divide the property. The power was to advance not the
v. income, but a bulk sum. The discretion as to the amount was
L'ESTRANGE. left to the trustees, as in *Phene's Trusts* (1), where a discretionary
 power of appointment was held to exclude a joint tenancy.

Redmond Carroll, for defendant, Mrs. Anne L'Estrange, in her capacity as administratrix of Annie L'Estrange and also of Sarah L'Estrange, both deceased, two of the residuary devisees, supported the contention put forward on behalf of Daniel L'Estrange, and referred to *White's Trusts* (2), and *Casterton v. Sutherland* (3).

Molony, K.C., in reply:—

The cases referred to on the other side were all cases of marriage articles, which are merely headings of agreements, and must not be construed as formal dispositions. In *Gant v. Laurence* (4) the words "in part of the share to which he will become entitled" occur, which are distinct and clear words of severance. In *Phene's Trusts* (1) power was given to the trustees to divide the fund in any way they liked, which was really a power of appointment. Doubt has been thrown on the latter case in *Armstrong v. Armstrong* (5). Here there is a joint fund, and the trustees had power of withdrawing such portion or portions as might be necessary as a provision for the children who were minors.

THE VICE-CHANCELLOR held that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that, consequently, a tenancy in common was created in the residue.

Solicitors for the plaintiffs: *Findlater & Co.*

Solicitors for Mrs. Anne L'Estrange: *Meldon & Co.*

Solicitor for Daniel L'Estrange: *Meredith.*

J. MAC M.

(1) L. R. 5 Eq. 346.

(2) John. 656.

(3) 9 Ves. 445.

(4) Wightwick's Rep. 395.

(5) L. R. 7 Eq. 518.

SECRETARY OF STATE FOR WAR v. STUDDERT.

H. L.
1902.*Practice—Trial by jury—Notice of trial.*

June 17.

APPEAL by the defendants, Studderts and Gregg, from the judgment of the Court of Appeal (*ante*, p. 240).

Ronan, K.C., and *J. F. Popham* (the latter of the English Bar), for the appellants.

The Solicitor-General (Campbell, K.C.), and *Morphy*, for the respondent.

THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Maenaghten, Shand, Brampton, Robertson and Lindley), without calling on the respondent's counsel, affirmed the decision of the Court of Appeal (1).

Solicitors for the appellants: *Cole & Jackson* for *Denroche*.

Solicitors for the respondent: *Meynell & Pemberton* for *Walker & Son*.

(1) *Ex rel.* Mr Morphy.

Madden, J.
1902.

CASEY v. BENTLEY.

March 3. *Stock Exchange—Sale of shares—Custom of Stock Exchange—Refusal of*
Company to register transfer—Action by vendor for specific performance
Appeal. *or rescission of contract—Regulation of Company empowering directors to*
 1902. *refuse to register purchaser as transferee of shares.*
 April 30.
 May 8.

A contract for the sale of shares in a registered company, with unlimited liability, was made through stockbrokers, subject to the Rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him by the vendor of a duly executed transfer, together with the certificate of the shares. One of the regulations of the Company provided that it should be lawful for the directors to decline to register the transfer of shares to any person not approved of by the directors as transferee, and that thereupon such transfer should be void. An application for registration of the transfer being subsequently made to the directors of the Company by the purchaser, they refused to register him as the transferee of the shares. The vendor issued an equity civil bill, claiming specific performance of the contract, and asking that the purchaser should be ordered to procure the shares to be registered in his own name, or in that of some other person. The civil bill was subsequently amended by adding a prayer for an indemnity and for rescission of the contract; and the County Court Judge made a decree declaring the plaintiff a trustee of the shares for the defendant, and that the defendant was bound to indemnify the plaintiff against calls:—

Held, by Madden, J., that the inability of the defendant to register the transfer was the non-performance of a condition subsequent binding on the defendant, by reason of which the plaintiff was entitled to treat the contract as at an end; and that the shares should be re-transferred on return of the purchase money:—

Held, by the Court of Appeal (Lord Ashbourne, C., and Walker and Holmes, L.JJ., Fitz Gibbon, L.J., *dissentiente*), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the Company would register the transfer; and that the equity civil bill should have been dismissed.

APPEAL from the Recorder to Madden, J., sitting as a Judge of the High Court to hear appeals from the Recorder.

On the 31st January, 1898, the plaintiff through her stock-

broker, Mr. E. M. Kelly, agreed with the defendant to sell to *Madden, J.* him, and the defendant agreed to purchase two shares in the *1902.* Dublin & Glasgow Steam Packet Company, of which the plaintiff was the owner, at the price of £3 17s. 6d. The agreement was *Casey* entered into in the mode and manner usual in similar transactions *v.* on the Dublin Stock Exchange. *Bartlett.*

In pursuance of the said agreement, a proper transfer of the shares from the plaintiff to the defendant was duly executed and delivered to the defendant with the certificate of the said shares, and the purchase money was duly paid on or before the 11th March, 1898.

The said Dublin & Glasgow Steam Packet Company is an unlimited Company, duly registered pursuant to the Companies Act, 1862, and by the 15th Regulation of the Company it is provided that "it shall be lawful for the directors to decline to register the transfer of shares to any person not approved of by them as transferee, and thereupon such transfer shall be void, and the directors shall not be compellable to give any reason for such refusal."

The defendant made several applications to the directors of the Company (accompanied by the said instrument of transfer executed by plaintiff and defendant, and the certificate), to have his name entered in the register book of the Company as holder of the said two shares, but the directors in exercise of the power aforesaid refused to register the defendant as the holder of the said shares.

The Company continued, notwithstanding the aforesaid sale, to pay the dividends on the shares, as the same fell due to the plaintiff; and the plaintiff on the 17th October, 1900, in consequence of a letter from the defendant's solicitor threatening proceedings, paid to the defendant under protest the sum of £3, being the dividends which she had received from the Company in respect of the said shares.

On the 15th January, 1901, the plaintiff issued an equity civil bill before the Recorder of Dublin, claiming specific performance of the agreement so far as the same remained unperformed, and that the defendant should be ordered to obtain the registration of the said shares in the books of the Company in his

Madden, J. own name or in that of some person other than the plaintiff, and
1902. damages for the non-performance of the said agreement.

CASEY
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The equity civil bill came on for hearing before the Recorder, when it was ordered that the plaintiff should be at liberty to amend the civil bill by adding a prayer for an indemnity, and also for a rescission of the contract. The case came on again on an amended pleading, when the Recorder made a decree in the following terms :—"On hearing the oral evidence of the defendant, and it appearing that the defendant though acting in good faith was unable to obtain the consent of the directors of the Company to the registration in his name of the shares, the Court doth declare that the plaintiff is not entitled to enforce by specific performance such registration as was prayed for ; and the Court doth further declare that inasmuch as the sale and transfer of the said shares has been made through and in accordance with the rules of the Stock Exchange, the plaintiff, in accordance with such rules, is not entitled as a matter of right to enforce such registration or to rescind the contract, provided the defendant acting in good faith has endeavoured but failed to obtain registration by the Company, and doth therefore refuse to direct that the contract should be rescinded ; and the defendant offering in open Court to give to the plaintiff a proper indemnity against liability on her part in respect of said shares, let such indemnity be given accordingly. In case the plaintiff elects to accept same let each party abide her and his costs in this action ; and in case the plaintiff declines such indemnity, let this action stand dismissed with £8 8s. costs to be paid by the plaintiff."

The plaintiff appealed, when, after hearing *J. Leech* for the plaintiff, and *Serjeant Dodd* and *Whitaker* for the defendant,

MADDEN, J., who heard the civil bill appeal, delivered judgment as follows :—

This appeal involves an important question in Company law, which has not yet been decided.

On the 31st January, 1898, the plaintiff entered into an agreement through a broker on the Stock Exchange, Mr. E. M. Kelly, for the sale to the defendant of two shares in the Dublin and

Glasgow Steam Packet Company for the sum of £3 17s. 6d. The purchase money was paid, and a transfer of the shares executed and delivered to the defendant on the 11th March, 1898, along with the certificate. The Company has been registered under the Companies Acts, with unlimited liability in respect of shares, and the plaintiff's object in selling the shares appears to have been to get rid of this liability. The defendant has been repeatedly called upon to complete the transaction by procuring the registration of the transfer to him. This has not been done, not through any default on his part, but by reason of the refusal of the directors to accept him as registered owner of the shares. It is unnecessary to consider the reasons assigned for this refusal, inasmuch as under the Articles of Association the directors possess an absolute discretion in this matter.

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The plaintiff's case, as now presented, seeks for a declaration that the contract is at an end, the defendant having failed to perform a condition subsequent to the entering into the contract, the duty of performing which rested upon him, and which is necessary to its completion, that is to say, the registration of the transfer. As a consequence she seeks a re-transfer of the shares upon the terms which I shall afterwards state, and the equity civil bill is to be taken as amended accordingly.

The defendant contends that the contract between him and his vendor was completely carried out when the purchase money was paid and the transfer executed, that the registration of this transfer was no part of the contract, and that he was under no obligation to the vendor to relieve her from liability by constituting himself the legal owner of the shares. He admits that the plaintiff is entitled to an indemnity against future calls upon the shares which (according to his contention) she is bound to hold, for all time, as his trustee.

In order to ascertain the rights of the parties in the events which have happened, the first matter to be determined is the exact nature of the contract out of which this sprang. It is a contract to be performed in accordance with the rules of the Stock Exchange, and with the rules and regulations of the Company, contained in the Articles of Association, under which the directors have absolute discretion as to the acceptance or rejection of members.

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The nature of such a contract has been stated in the following terms by Romilly, M.R.:—"It was a contract conditional on the Company accepting the defendant as a shareholder. Whether it was so stated at the time of the contract is not of very much importance, because that must necessarily be implied in every contract for the sale of shares. The sale of shares can only take place provided it is in conformity with the rules and regulations of the Company. Here the 225th and 234th articles provide that the directors shall have power to reject a person from becoming a shareholder, and they make the approval of the directors necessary to constitute a complete and valid sale of shares from a shareholder in the Company to a stranger. Consequently, no contract for the sale of shares by a shareholder in this Company will be valid, nor can it be carried into execution, unless the directors can be compelled to admit the purchaser as a shareholder:" *per* Romilly, M.R., in *Bermingham v. Sheridan* (1).

Accordingly, the Master of the Rolls refused specific performance of a contract for the sale of shares at the suit of the vendor when there had been a *bona fide* refusal on the part of the directors to register the transferee as a member of the Company.

The defendant's case derives no assistance from such cases as *Marted v. Paine* (2); *Coles v. Bristowe* (3); or *Nickalls v. Merry* (4). These authorities negative the existence of any obligation on the part of the immediate purchaser of shares to take a transfer to himself, but they throw no light upon the obligation of a purchaser taking a transfer to have it registered in accordance with the regulations of the Company.

The duty of registration in the case of a sale to a jobber is stated in Fry on Specific Performance, section 1503, in words that are of general application. He describes the contract as being:—"To the effect, that at the settling day he will either take the shares himself, in which case he must accept and register a transfer, and indemnify the vendor, or he will give, as purchaser or purchasers, the name or names of one or more persons capable of

(1) 33 Beav. 660, at p. 663.

(2) L. R. 6 Exch. 132.

(3) L. R. 4 Ch. 3.

(4) L. R. 7 H. L. 530.

contracting, and who had authorized him to contract for them, and to whom no reasonable objection can be made.” *Madden, J.*
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Serjeant Dodd said that the obligation cast upon the transferee in respect of registration is stated too strongly in the passage which I have quoted. But he was unable to refer to any qualifying expression elsewhere. On the contrary, I find the following passage in Mr. Justice Buckley's work on the Companies Acts. Commenting on the 26th section of the Act of 1867, which provides for the registration of a transfer, at the request of the transferor, “in the same manner and subject to the same conditions as if the application for such entry was made by the transferee,” he says:—(p. 614 of 7th Ed.) “Upon a sale of registered shares in a Company the only contract is that the seller shall execute a valid transfer of the shares and hand it to the transferee, and so do all that is necessary to enable the transferee to insist with the Company on his right to be registered. It is then for the transferee to pay the consideration money and get the transfer registered. It is no part of the contract that the transferor will get it registered. And this position is not altered by this section. The section is only for the protection of the transferor if the transferee fails to perform his duty: *Skinner v. City of London Marine Insurance Corporation*” (1).

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The case upon which the defendant's counsel mainly relied was *The London Founders Association v. Clarke* (2). In that case shares in a limited Company were sold through brokers on the Stock Exchange, the transfer was executed by the vendor, and the money paid by the purchaser according to the usages of the Stock Exchange. Subsequently the directors of the Company, in exercise of their powers under the Articles of Association, refused to register the transferee as a member, who thereupon brought an action to recover the price of the shares, on the ground that it was an implied term of the contract, by way of condition subsequent to be performed by the vendor, that if the Company were to refuse to register the transfer the contract should be considered to be at an end. The Court of Appeal refused to import any such condition subsequent into the contract of sale, which they

(1) 14 Q. B. D. 382.

(2) 20 Q. B. D. 576.

Madden, J. held to have been completely performed, so far as the vendor was concerned, upon payment of the price and delivery of the transfer executed by him. This case was conversant only with the obligation cast upon a vendor in a contract of the kind under consideration. In the present case the obligation to register is sought to be cast upon the purchaser, and so far from negating the existence of such an obligation, I find Lord Esher, M.R., quoting with approval a passage from the judgment of Crompton, J., in *Stray v. Russell* (1), in which he states that, under a contract of this kind, "it is at least probable that the vendee was to take upon himself the duty of getting the transfers completed and the shares registered."

It is abundantly clear, from the authorities to which I have referred, that the duty of registering the transfer lies on the transferee as between himself and his vendor. It is also clear that the registration of the transfer is a necessary condition to the complete carrying out of the contract of sale, as defined by Romilly, M.R., in the judgment from which I have quoted. It follows, in my opinion, that the neglect of this duty is the non-performance of a condition subsequent, binding on the vendee of shares, by reason of which the vendor is entitled to treat the contract as at an end, and to call for a re-assignment of the shares. It would be certainly strange if the purchaser could by his default in discharging a duty cast upon him by law, convert the vendor, against his will, into a continuing trustee of the shares, subject to an unlimited liability in respect of calls. The vendor is not, in my opinion, bound to accept this position, even on the terms of obtaining an indemnity from the purchaser. Accordingly, I make an order for the re-transfer of the shares on the terms offered by the plaintiff, which have not been objected to by the defendant.

The defendant asked for special leave to appeal to the Court of Appeal in pursuance of the County Courts Appeal (Ireland) Act, 1889, and liberty was given.

J. G. T.

(1) 1 E. & E. 888, 914.

The case came before the Court of Appeal (LORD ASHBORNE, C., FITZ GIBBON, HOLMES and WALKER, L.JJ.), by way of case stated by Madden, J. :—

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The contract was complete when the purchase money was paid and the transfer was executed. When shares are sold subject to the usage of the Stock Exchange, there is no implied condition that the purchaser must get the transfer registered: *Stray v. Russell* (1); *London Founders Association v. Clarke* (2); *Walker v. Bartlett* (3). An indemnity by the purchaser is the recognised method of answering the plaintiff's claim: *Kellock v. Enthoven* (4); *Loring v. Davis* (5).

Ronan, K.C., and *J. Leech*, for the respondent :—

The plaintiff wished to get rid of the liability involved in unlimited liability, and completed her part of the contract. It is the duty of the purchaser to obtain registration of the transfer; if he fails to do so in a reasonable time, the vendor is entitled to be restored to his former position, because the purchaser has failed to perform a condition subsequent, the duty of performing which devolved upon him: *per* Lord Cairns in *Ward & Henry's Case* (6); *Skinner v. London Marine Insurance Company* (7).

Walker v. Bartlett (3) does not apply, because the form of the contract showed that the defendant was not to be bound to register unless he liked. In the *London Founders Co. v. Clarke* (2) the contract failed on account of something omitted to be done by the vendor.

A share is the interest of a shareholder in the Company measured by a sum of money for the purpose of liability in the first place, and of interest in the second, but also consisting of mutual covenants entered into by all the shareholders *inter se* in accordance with sect. 16 of the Companies Act, 1862, *per* Farwell, J., in *Borland's Trustee v. Steel Brothers* (8).

(1) 1 E. & E. 888, 917.

(2) 20 Q. B. D. 576.

(3) 18 C. B. 845.

(4) L. R. 8 Q. B. 458; L. R. 9

(5) 32 Ch. D. 625.

(6) L. R. 2 Ch. 438.

(7) 14 Q. B. D. 882.

(8) [1901] 1 Ch. 288.

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Once the contract became impossible of completion, not owing to any default by the vendor, equity will rescind it. The indemnity offered is useless; the purchaser may now be a wealthy man, but in a short time he might be poor, and his covenant worth nothing; or he might be dead and his assets distributed when the Company failed.

May 8.

LORD ASHBOURNE, C. :—

This case raises a novel and interesting question on the duty of registering a transfer of shares purchased on the Stock Exchange, and the question is, What is the position of buyer and seller when the directors of the Company, acting within their powers, refuse to register the transfer though the purchaser has paid his money?

It appears that the plaintiff, Mrs. Casey, was possessed of two shares in the Dublin and Glasgow Steam Packet Company, which is an unlimited Company, and being desirous of escaping from a Company with unlimited liability, she agreed on the 31st January, 1898, through her stockbroker, Mr. Kelly, to sell her shares to the defendant. In pursuance of that agreement the transfer was signed by the plaintiff, and accepted, and the purchase money was paid. When the defendant sought to have his name placed on the list of shareholders, the directors of the Company refused to register the transfer, relying on their 15th Regulation, which prescribes :—"It shall be lawful for the directors to decline to register the transfer of shares to any person not approved of by the directors as transferee, and thereupon such transfer shall be void, and the directors shall not be compellable to give any reason for such refusal."

The defendant unquestionably acted with perfect good faith, and exhausted all the opportunities open to him of getting the transfer registered; on the other hand, it is not denied that the Company are within their rights in acting as they did in the matter. The dividends which have accrued since the sale of the shares have been regularly paid to Mrs. Casey, and she has paid them over to the defendant, on his demand, but under protest.

Matters have stood thus for four years. The plaintiff desired to bring the question to an issue, and in order to elucidate her position she issued an equity civil bill in January, 1901, before the Recorder,

claiming specific performance of the agreement so far as the same remained unperformed, and asking that the defendant might be ordered to procure the shares to be registered in his own name or in that of some other person. When the matter came before the Recorder in February, 1901, it was found that that civil bill would not really present the case, and therefore an amendment was assumed to be necessary by all the parties. The civil bill was accordingly amended by the Court, a claim being added to the prayer for specific performance, asking for an indemnity and also for rescission of the contract. This amendment was made because the plaintiff, who was the vendor, finding that the original purchaser could not give her the relief she sought, thought that the best thing to do was to get rescission of the contract, and then seek for another purchaser, to whom the Company would not object. The matter was fully discussed before the Recorder, who announced his decision—as to the relief originally claimed—that the lady was not entitled to specific performance; and, as to the relief sought by the amendment, the Recorder declared that as the sale and transfer of the shares had been made in accordance with the rules of the Stock Exchange, the plaintiff was not entitled as a matter of right under those rules to enforce registration or rescind the contract, provided the defendant acting in good faith had endeavoured but failed to obtain such registration; and he therefore refused to direct the contract to be rescinded; and thereupon the defendant offering in open Court to give the plaintiff an indemnity against liability in respect of such shares, the Recorder decreed that such indemnity should be given, and if the plaintiff elected to take same, each party was to abide his own costs, and if the plaintiff did not elect to take the indemnity the action was to be dismissed with costs.

The case came before Madden, J., on appeal from the order so made by the Recorder. Shortly expressed, the view taken by Madden, J., was, that in the events that had happened, the plaintiff had the right to rescind the contract, and that she should be placed in the same position as before the agreement, so as to be able to sell to some other person. The plaintiff's case was that it was an implied term of the contract that the defendant should procure the registration of the shares in the name of some person

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other than the plaintiff. It was urged that the offer of an indemnity was not accepted by the plaintiff, an indemnity was not what she was seeking; it would vary according to the solvency of the party who gave it, and it was not the fulfilment of the contract entered into. Madden, J., in his judgment states:—"It is clear that the registration of the transfer is a necessary condition to the complete carrying out of the contract of sale. It follows, in my opinion, that the neglect of this duty is the non-performance of a condition subsequent, binding on the vendee of shares, by reason of which the vendor is entitled to treat the contract as at an end, and to call for a re-assignment of the shares." The learned Judge was asked to state a case for the opinion of this Court, and he consented, and upon the case so stated, the point, which is both novel and important, has been argued before us.

There is a clear distinction between the purchase of shares on the Stock Exchange and by private contract, and it is essential to keep this distinction clearly in view when reading the authorities, and when considering the comments in Fry on Specific Performance and Lindley on Companies.

There are many cases where purchasers have proceeded against vendors of shares on the Stock Exchange seeking for relief where the directors have refused to register the transfers, and thus complete their legal title. But I have been unable to find any case, like the present, where the vendor, having been paid the purchase money and executed the transfer, and the purchaser having *bona fide* failed to obtain registration owing to a legitimate refusal on the part of the directors acting within the scope of their legal powers, is perfectly willing to remain equitable owner of the shares and let matters rest, but is, nevertheless, sued by the vendor praying for the rescission of the contract, in consequence of the purchaser not having succeeded in getting the shares registered in his name, which he admittedly could not have done.

The general position is stated by Fry, L. J., in his work on Specific Performance, 1519:—"Where the constitution of the Company gives the directors a power to refuse to register transfers, the question arises whether the refusal on the part of the directors to register the purchaser relieves him from the obligation of performing the contract. This question must be answered

differently according to circumstances. Where the contract is not made on the Stock Exchange, but is made in the reference to the constitution of the Company or subject to its rules, and the constitution of the Company requires the vendor to do all that is essential to the transfer, the vendor is under an obligation to procure the assent of the directors, and if he fail so to do, the purchaser is relieved from the contract, and if he have already paid his purchase money in ignorance of this refusal he may recover it back. Where the contract is made on the Stock Exchange, and subject to its rules, it is clear that the refusal of the directors to register the transfer is immaterial, for, according to the construction put upon such a contract, it is performed on the vendor's part by the delivery of the transfer and certificates, and the vendee is entitled to the right which he thereby acquires to procure himself to be registered, if the directors so choose; he is not entitled to an absolute and unconditional right to registration. In a sale on the Stock Exchange it is no part of the vendor's duty, irrespective of express contract, to procure the registration of the transfer."

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The position of the purchaser I take to be sufficiently clear from the cases cited by the learned writer. So long ago as 1859 it was decided in the case of *Stray v. Russell* (1) that the vendor was not bound to register, and that he performed his obligation to the purchaser by executing the transfer, leaving the purchaser to obtain registration as best he could.

After the execution of the transfer and payment of the price the vendor becomes a trustee for the purchaser, and the purchaser is bound to indemnify the vendor against all liability in respect of the shares: *Paine v. Hutchinson* (2). If the ultimate purchaser is trustee for an intermediate purchaser and the transfer to the ultimate purchaser is never registered but the vendor continues the legal owner of the shares and incurs liability in consequence, he is entitled to be indemnified against loss by the beneficiary: *Castellan v. Hobson* (3).

The case of *The London Founders Association v. Clarke* (4) is of the highest importance. The facts on which it turned are thus

(1) 1 El. & El. 888.

(2) L. R. 3 Eq. 257.

(3) L. R. 10 Eq. 47.

(4) 20 Q. B. D. 576.

Appeal. stated in the marginal note:—"A contract for the sale of shares
 1902. in a registered Company was made through brokers upon and
 CASEY subject to the rules of the Stock Exchange. In accordance
 v. with the practice of the Stock Exchange, the transferee of
 BENTLEY. the shares paid the price of them to the vendor upon delivery to
 Lord him of a duly executed transfer. An application for registra-
 Ashbourne, C. tion of the transfer being subsequently made to the directors of
 the Company, who were empowered by the Articles of Association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the Company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use." Under these circumstances the Court of Appeal held, following *Stray v. Russell* (1), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the Company would register the transfer and that the action was not maintainable.

In giving judgment, Lord Esher said (at page 579)—"It was admitted by the plaintiff's counsel that he must contend that, although the contract was for payment of the price of the shares when the transfer was handed over, and before the name of the transferee was submitted to the Company with a view to registration, it was an implied term of the contract by way of condition subsequent that, if the Company for any reason refused to register the transfer, the contract should be considered at an end, and the price would then be recoverable on the ground of a total failure of consideration. That contention involves two propositions: first, that there is such a condition subsequent; secondly, that there would be a total failure of consideration. Whether it could be maintained that there would be such a total failure of consideration, according to my view, we need not inquire; because, in my opinion, the first proposition cannot be maintained. I think it would be absolutely wrong at this time of day to throw any doubt upon the true construction of such a contract as this made on the Stock Exchange, or to admit for a moment the contention that there is such an implied condition subsequent as suggested. That conten-

(1) 1 E. & E. 838.

tion put in plain words really implies that the seller has contracted absolutely that the Company will register the transfer to the purchaser or his nominee. In the year 1859 the very same point in precisely such an action as this came before the Court of Queen's Bench in the case of *Stray v. Russell* (1), and was decided, and that decision is binding until reversed."

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Later on Lord Esher says, speaking of *Stray v. Russell* (1)—
“The Court was there asked to introduce an implied term into the contract, and they acted on the rule, that such an implication cannot be made unless it be clear that both parties must have intended what the Court is asked to imply. They thought it unlikely that the parties would agree that money should be paid and received, and then, upon the happening of something over which neither of them had any control, that the money should be paid back, and therefore they held that the suggested implication could not be made. Taking the decision of the Queen's Bench alone, I do not think that, even if we did not agree with the reasons they gave, we could nearly forty years afterwards overrule a decision as to the construction of a contract in daily mercantile use, which must be taken to have been the basis upon which all subsequent contracts of the same description were made. But, speaking for myself, I think the view taken by the Queen's Bench was confirmed by the Exchequer Chamber (2). In my opinion, if the plaintiff's counsel were right in his contention, the contract must involve an absolute undertaking by the seller that the Company will accept the purchaser or his nominee as a member of the Company.”

Then at p. 582 he says—“The purchaser might have a remedy against the Company, but I do not think that the vendor does undertake that the Company will accept the purchaser so as to make himself responsible for their refusal to do so. The purchaser takes that risk on himself, and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser. I must say that, considering the matter as a matter of business apart from authority,

(1) 1 E. & E. 888.

(2) 1 E. & E. 917.

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I should have come to the same conclusion as the Court of Queen's Bench, and declined to imply the suggested condition subsequent. It does not seem to me a business-like or possible agreement under the circumstances that a man should receive money on the condition subsequent that, if something afterwards happen over which neither of the parties has any control, the money shall be paid back."

Lord Justice Fry says (at p. 583)—"The contract was for sale and purchase of shares subject to the rules of the Stock Exchange, such shares not being securities that passed by delivery but by transfer, the directors of the Company having, however, by the Articles of Association power to refuse to register the transfer if they did not approve of the transferee. The counsel for the plaintiff contended that the true nature of the contract was to the effect that the vendee agreeing to pay the purchase money, the vendor agreed to procure that the Company should register the vendee as owner of the shares, and the vendee should so obtain the *status* of a member of the Company, and that the vendor having failed to perform that agreement, there was a total failure of consideration. The other view of the contract is, that it is merely to the effect that the vendor agrees that on payment of the agreed price he will hand to the vendee a genuine transfer and certificates, and that there is no condition subsequent such as suggested, viz. that if the Company refuse to register the transferee the price shall be refunded. The question is, which of these is the true view of the effect of the contract? It seems to me that the nature of the machinery or arrangements of the Stock Exchange affords strong reason for thinking that the latter is the true construction of the contract. The practice requires that on a certain day the name of the proposed transferee shall be given, and that on the delivery of a duly executed transfer, with the certificates of the shares, to such transferee, payment of the price shall be made. The execution of the transfer and payment of the price are prior to the time at which the exercise of the power of the directors to accept or refuse the transferee takes place. The natural inference appears to me to be that the intention of the parties was that all which the vendor undertook to do under the contract was to be done prior to the payment of

the price and delivery of the transfer. The fact that the payment of the price is to be made before any question of obtaining the consent of the Company to the registration arises is strong to show that the procuring of such consent is not one of the things which the vendor undertook. This consideration would of itself lead me to the conclusion that the contention for the plaintiff was contrary to the facts.”

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It is thus abundantly clear on the authorities that the purchaser cannot rescind the contract because he cannot obtain registration. The effort is now made for the first time to turn the tables and say that the vendor is entitled to rescind the contract because the directors have refused the most urgent requests of the purchaser to be registered. There is no authority for this to be found in any case of transfer of shares on the Stock Exchange. The case of *Birmingham v. Sheridan* (1), quoted by Mr. Justice Madden—if it was a Stock Exchange case at all—can, as pointed out in Lord Justice Lindley’s book, no longer be relied on as law. The case of *Wilkinson v. Lloyd* (2), so much relied on in *Stray v. Russell* (3), was not a Stock Exchange case, and is quite distinguishable.

In his judgment in *Stray v. Russell* (3), Crompton, J., said (at p. 913)—“The fact of the payment being to be made on the handing over of the certificates and transfers, and the practice stated as to no prior consent being ever asked for, and as to no assent being ever refused, make it very probable that the vendee in such case bargains only for the delivery of the shares and transfers and takes the chance of getting himself or his nominee or subvendee accepted and registered. The plaintiff must be taken to have known of the clause in the deed as to the consent, and he may well have bought, taking the chance of procuring such acceptance or registration on himself. He seems to have bought the shares, certificates and transfers, on the agreement to pay for them on delivery of the documents. In *Wilkinson v. Lloyd* (2) the Court assumed that the consent to the assignment was a part of the vendor’s title, as in the case of sale of a lease; but whatever may have been the case of the purchase of the partnership shares in the mines (real

(1) 33 Beav. 660.

(2) 7 Q. B. 27.

(3) 1 E. & E. 888.

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property to some extent), in that case on a sale between the parties not according to any course of business on the Stock Exchange, I can make no such assumption in the present case, where the sale was, according to the regulations of the Stock Exchange, which made the price payable on handing over the shares and transfers, and according to which it is at least probable that the vendee was to take upon himself the duty of getting the transfers completed and the shares registered, and where from the nature of the transaction, it seems to me very unlikely that the vendor should undertake for the acceptance of any particular name or person when he may have been entirely ignorant at the time of the contract of the name and responsibility of the intended transferee."

It is said that it would be hard on the plaintiff to hold her bound to the shares she had sold and struggled to get rid of. But it was equally hard to hold the parties bound in the decided cases to which I have referred. If the plaintiff had been well advised she could have safeguarded her position and stipulated with her stockbroker that he was to stipulate for registration as a clear term in his Stock Exchange contract. In *Cruse v. Paine* (1), where the purchaser expressly guaranteed the registration of the shares, he was held liable to indemnify the seller. The sale note in that case had written across it the words "registration guaranteed." Lord Hatherley in his judgment expressly pointed out that the superadded provision of "registration guaranteed" made the defendant liable to procure registration.

For these reasons, I am of opinion that the decision of Madden, J., cannot be sustained, and that the view of the Recorder is more in accordance with the result of the decisions, and that therefore the appeal should be allowed. .

FITZ GIBBON, L. J. :—

But for the difference of opinion here I should have thought the decision of Madden, J., clearly right.

In this case there is a combination of two material circumstances which did not co-exist in any of the authorities to which we have been referred—

(1) The plaintiff is not the party upon whom the duty fell of

(1) L. R. 6 Eq. 641; L. R. 4 Ch. 441.

doing the act, the non-doing of which prevented the full performance of the contract.

(2) The consolidated regulations of the Company whose shares were sold contain an express provision that upon the directors declining to register the transfer of shares to any person not approved of by them as transferee, such transfer "*shall be void*, and the directors shall not be compellable to give any reason for such refusal."

Under the general law of specific performance, it appears to me that where a contract is made which contemplates the performance of distinct acts by each of the parties, if either of them fails to do any act which falls upon him, and which is necessary to give the other party the full benefit of the contract in accordance with the common intention of both, that other party may, upon such failure, elect to rescind; but unless it can be gathered from the terms or circumstances of the contract that full completion by both was not intended to be a condition precedent to its being binding on either, the party who has discharged all his obligations may hold the other bound, and may elect not to rescind, even though the cause of the failure of the other party to completely perform all that was intended was beyond the control of either.

In all cases such as this the first question to be determined is—*What is the contract?* The terms of a contract to buy or sell shares is not necessarily, nor even usually, to be found in the express agreement between the parties.

Where the transaction has taken place on the Stock Exchange, the rules and regulations of the Stock Exchange are incorporated with it. They become so many additional terms of the contract. Furthermore, where the subject-matter of the contract is shares in a Company, the regulations of the Company affecting its shares are, in the appropriate words of Farwell, J., "original incidents of the share." He points out in *Borland v. Steele* (1) that "a share is not a sum of money which is dealt with in a particular manner by what are called for the purpose of argument executory limitations . . . A share is the interest of a shareholder measured by a sum of money for the purpose of liability in the first case

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(1) [1901] 1 Ch. 288.

Appeal. and of interest in the second, but also consisting of a series of
 1902. mutual covenants entered into by all the shareholders *inter se*.”
CASEY Here, therefore, the terms of the contract include the rules of the
v. Dublin Stock Exchange and the regulations of the Glasgow
BENTLEY. Steamship Company. What was the real intention of the parties
Fitx Gibbon, to this contract?
L.J.

The Company was one of unlimited liability. The object of the seller was to get rid of this liability; the object of the purchaser was to obtain, with other advantages, the voting power attached to the shares of the Company, which was in course of re-organisation. Neither of these objects could be attained by any equitable transfer, or by anything except a transfer completed by registration of the transferee. Registration of the defendant as transferee was rendered impossible by the refusal of the directors to register Mr. Bentley as a shareholder, and the completion of the transaction in accordance with the full intention of both parties was therefore rendered impossible by a cause which was beyond the control of either of them. But this impossibility was inherent in the subject-matter of the contract, through the regulation which I have quoted. The risk of this failure was an “original incident of the share,” and I shall presently refer to clear authority that under such circumstances that risk was, in law, an incident of the contract itself, the effect of which was governed by the terms of the regulation. By those terms the transfer thereupon became *void*. When the contract became void, total failure of consideration was *prima facie* the consequence; each party was bound to give back anything which he had received under it, and both parties at law and in equity *prima facie* were restored to the same position as if it had never been made.

I say “*prima facie*,” because there are cases in which the terms or circumstances of the contract show that, when one party has fulfilled his part of it, he is entitled to hold the other party bound, and to retain what he has got, leaving that other party to take the risk, and to bear the consequences, of his own inability to satisfy a condition of full enjoyment which the contract put it upon him to satisfy.

But even in such a case, if the partial carrying out of the transaction has still left the first party at any disadvantage, or

subject to any liability, from which its full completion would have relieved him, he may, in my opinion, on notice that the other cannot, or will not, fully carry it out, elect to rescind the contract, because he has not got the full consideration for which he made it.

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The authorities are clear that in this last case the party who desires to escape from the disadvantage or disability, cannot sue for *specific performance*, because that is impossible. But there is no authority that I can find for the proposition that the inability of one party to do an act contemplated by the contract, which is necessary to give the opposite party the full protection intended, will deprive that party of his right of election to rescind. I agree that the original action for specific performance by Mrs. Casey was not maintainable. But the amended civil bill prayed for rescission, and I think that Madden, J., was right in awarding it. The reversal of his order means merely the dismissal of the vendor's action, and I do not profess to understand whether or how far that dismissal finally decides the respective rights or liabilities of the respective parties in respect either of dividends, interest, indemnity, or equitable ownership. Such a conclusion is scarcely a decision.

I think that the authorities show that a party who has performed all his part of a contract can hold the other party bound by it, only where what he has done is operative and has passed some value to the other party. A condition that a transfer shall be or become void is inconsistent with its being or remaining operative for any purpose, and therefore the condition that this transfer became void on the directors refusal to register the transfer created a total failure of consideration. Where such a condition is a term of the contract, its operation must be the same whether it be subsequent or precedent. For this the judgments in the *Founders Case* (1) are clear authority.

One other subject requires an observation before going to the authorities. It is the contention that this contract can or ought to be performed—*cy près* as it were—by leaving Mrs. Casey the registered shareholder, and making her a trustee of the shares for the defendant, with a right of indemnity against calls.

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In the first place, there is no authority for holding that she is bound to accept such an indemnity. The judgment of the Recorder offered it to her, with the alternative of the dismissal of her action, but he did not suggest that Mr. Bentley could compel her to take it. Like a variation or compensation, indemnity may be accepted by the party not in default, but it can not be forced on him or enforced against him, under the rudiments of the law of specific performance. Secondly, no effective indemnity could be given in the present case, for the liability attached to the legal ownership of the shares is perpetual and unlimited; the only indemnity offered was the personal covenant of the transferee, which is limited by his solvency, and must terminate whenever it ceases to be possible to follow his assets. Except where the party entitled to indemnity sued for it or elected to take it, I can find no case in which indemnity took any other form than liquidated damages for the loss or liability existing at the time of the judgment, and that amount is here *nil*.

Therefore I hold—*first*—that Mrs. Casey is entitled to maintain this suit for rescission, as the only means by which she can get back her shares for the purpose of keeping them until she can find a transferee whom the directors will accept as the legal shareholder. She is, of course, bound to repay the price, either with legal interest or with a sum by way of interest equivalent to the dividends payable at the time during which the defendant was the inchoate transferee. This she has offered.

Secondly, I hold that the non-registration made the transfer *void*, and that the contract was thereby defeated by a condition subsequent, and that this defeasance carried with it the same consequences as a rescission.

It will be observed that each of these grounds of decision is complete in itself, and leads to the same judgment in favour of the plaintiff. But each is independent of the other, and the only remaining question is whether *either* of them is consistent with the decisions to which we have been referred.

The principal authority relied on for the defendant is the *Founders Case* (1): In that case, as here, the duty of registration

was by the rules of the Stock Exchange thrown on the vendee. The vendee was the *plaintiff*. He sued to recover back the price of the shares, and his action was dismissed simply because the vendor had done all that he had contracted to do, and had thereby given valuable consideration, and registration being thrown on the vendee, the vendor was entitled to hold him to his bargain, as there was not a total failure of consideration, and such failure as there was arose from the risk of non-registration, which fell on the vendee. Lord Esher said that the very same point in precisely such an action was decided in *Stray v. Russell* (1), and that that decision was binding. Fry, L.J., said that analogies had been pressed upon the Court with the object of showing that the decision in *Stray v. Russell* (1) was wrong, and Lopes, L.J., said: "*Stray v. Russell* (1) is a clear authority that the vendor of the shares is not under any liability to procure the consent of the directors to the transfer." These Judges treated the transfer as *pro tanto* operative, and not void. But it was not a case of unlimited liability; the vendor had fully performed his part of the contract, and had all the benefit for which he had bargained. Lord Esher referred to *Wilkinson v. Lloyd* (2) to show that it was unlikely that the parties would agree that money should be paid and received, and then, upon the happening of something over which neither of them had any control, that the money should be paid back. He said: "It does not seem to me a business-like or possible agreement under the circumstances that a man should receive money on the condition subsequent that if something afterwards happened over which neither of the parties has any control the money should be paid back." Fry, L.J., rejected the contention that the true nature of the contract was that the vendee agreeing to pay the purchase money, the vendor agreed to procure that the Company should register the vendee as owner of the shares, and the vendee should so obtain the *status* of a member of the Company, and that the vendor having failed to perform that agreement, there was a total failure of consideration. These observations show that the Judges were not dealing with a case where non-registration meant perpetual and unlimited liability to the vendor.

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(1) 1 E. & E. 888.

(2) 7 Q. B. 27.

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Furthermore, Fry, L.J., quoted the case of an assignment of a lease where the consent of the lessor to the assignment is necessary, as a case in which the consent would be a *condition precedent*, in which case the price could be recovered back, and all the Judges devoted the greater part of their judgments to proving that, in that particular case, there was no condition subsequent in the contract to avoid it on non-registration. The *Founders Case* (1), therefore, does not deal at all with the question of the right of a vendor to elect to rescind, where he cannot obtain the full benefit of the sale in a release from perpetual unlimited liability; and it is no authority for holding that, where unlimited liability is concerned, the vendor must remain for ever liable at law, and also become—against his will—a trustee of the beneficial interest for the vendee. So far from being an authority for the proposition that an article avoiding a transfer on non-registration, by way of condition subsequent, is inoperative, it assumes that if such a condition subsequent is a term of the contract effect must be given to it.

Further, I find in the judgment of Fry, L.J., a clear declaration that a condition in the regulation of the Company becomes a term of the contract, and binds both parties to every contract for sale of the shares. He says:—"In the case of *Wilkinson v. Lloyd* (2) there were regulations of the Company which required an owner who was desirous of transferring his shares to inform the Company of his intention to transfer, and made the consent of the directors a *condition precedent to the validity of the transfer*."

As the only materiality of a sale being made on the Stock Exchange is to import the rules into the contract, it is impossible to distinguish *Wilkinson v. Lloyd* (2) on the ground of its not being a Stock Exchange case, so far as both cases turned on the regulations of the Company, which are imported into the contract. Under the common law of contracts there is no distinction whatever between the effect of a condition precedent and a condition subsequent, where the condition subsequent avoids the contract on a specified event.

Two other propositions material here are laid down in *Stray v. Russell* (3), which the *Founders Case* (1) followed, and in

1) 20 Q. B. D. 576.

(2) 7 Q. B. 27.

(3) 1 E. & E. 888.

Wilkinson v. Lloyd (1), which Fry, L.J., adopted as illustrating the distinction between the two classes of cases, viz. :—

1. The class in which the contract wholly performed by one party as to his part of it can be insisted upon by him; and

2. The class of cases in which the contract is, *by its terms*, avoided, and the parties are remitted to their original rights.

In *Wilkinson v. Lloyd* (1) the vendee was *the plaintiff*. He sued for the price, and he was held entitled to recover it back, because the vendor had not performed his duty of obtaining the assent. There the party suing was the party not in default; therefore the plaintiff was entitled to recover on the ground stated by Patteson, J., that he was “*entitled to rescind the contract and treat the consideration as wholly failing.*” He held that the parties were to be replaced in *statu quo*. This decision, and all the reasoning of the Judges, to my mind apply to this case and govern the right of Mrs. Casey here, she being the party not in default and the plaintiff.

In *Stray v. Russell* (2) the plaintiff was the purchaser. He sued to recover back the price, and it was held that he could not do so, because the vendor, *who held him to his contract*, was not bound to procure the registration. But Campbell, C.J., held that there was *not a total failure of consideration*, because the purchaser got the transfers and certificates, and the purchaser had “*something valuable*” in the transfers and certificates; and although there had been an absolute refusal on the part of the directors to consent to the transfer, he should still have been of opinion that there was *not a total failure of consideration* entitling the plaintiff to recover back the purchase money. Erle, J., dissented, and thought that the plaintiff had had *no value for his money*, but Crompton, J., agreed with Lord Campbell on the construction of the contract, that the vendee in such case bargains only for the delivery of the shares and transfers, and *takes the chance* of getting himself or his nominee or sub-vendee accepted and registered. In giving the judgment of the Exchequer Chamber, construing the contract by the usage of the Stock Exchange, Williams, J., held that there was no undertaking by the vendor

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to obtain absolutely the consent of the directors to the transfer. At the most his contract was to obtain it only after the vendee had done what was reasonable towards obtaining it in the usual course.

This case has no application to an action by the party who is not in default claiming his right to rescind, where the other party cannot, or will not, give him the full benefit of it, and it equally has no application to a contract which contains a condition of defeasance. The passages which I have read are inconsistent with the suggestion that a condition which provides that a transfer shall be void can be cut down to mean that it shall be inoperative to confer the right to registration, remaining operative to pass the equitable property in the shares. Lindley (4th edition, vol. i. p. 718), states the law in such cases to be that "the purchaser takes the risk." But in each case "the risk" must be measured by the terms of the particular contract. In all cases where the vendor cannot otherwise get the full intended benefit of the sale, this risk, in my opinion, must include the risk that the vendor will elect to rescind the contract if he cannot get the full benefit of it, and in this case it must also include the risk that, upon the refusal of the directors to register the transferee, the transfer will "*be void*."

Ward & Henry's Case (1) is material for the expression of the opinion of Lord Cairns that equitable ownership will not satisfy a contract to give legal ownership. *Walker v. Bartlett* (2) is an authority to show that the indemnity to which a vendor who insists upon the contract is entitled, is the liquidated amount of the calls actually paid, where the vendee has not registered; and, lastly, Williams, J., in *Stray v. Russell* (3) holds, in the case of a Joint-Stock Company, that the parties *must be taken to know of the clauses in the deed*, a clear authority for importing into the terms of the contract between Mrs. Casey and Mr. Bentley the condition that upon the refusal of the directors this transfer should be void.

For these reasons, without any doubt except what is suggested by the difference of opinion, I hold that the decision of Madden, J., was right.

(1) L. R. 2 Ch. App. 431. (2) 18 C. B. 845. (3) 1 E. & E. 917.

I have not referred to *Birmingham v. Sheridan* (1) because it is, in my opinion, inconsistent with the decisions in other cases, as I believe that the dismissal of this action also is. The other cases cited do not affect any of the propositions on which my judgment rests.

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WALKER, L. J. :—

The contract in this case was for the sale of shares made through a broker on the Stock Exchange, subject to its rules and according to its usages, and we must assume that the parties were aware of those rules and usages and contracted with reference to them, knowing also—both of them—the regulations of the Company as to shares and the conditions attached to their transfer. I do not think we can regard what the motive of either party was for entering into the contract; we can only consider the effect of this contract itself.

I am of opinion that the civil bill of the plaintiff, whether framed in specific performance or for rescission, should be dismissed.

The plaintiff as the vendor sold to the defendant, through her broker, on the 31st January, 1898, two shares in the Dublin and Glasgow Steam Packet Company, a Company in which the liability of the shareholders is unlimited. This contract was, as I have said, entered into under the rules of the Stock Exchange, and we must assume, I think, it was to be carried out according to its usages.

There is a regulation of the Company providing that it should be lawful for the directors to decline to register the transfer of any shares to any person not approved of by them as transferee, without reason specified, and that thereupon such transfer shall be void. I think those words, “shall be void,” only mean shall have no effect against the Company. As between transferor and transferee her transfer was operative. The opposite view of this regulation forms, as I understand it, the foundation of Lord Justice Fitz Gibbon’s judgment.

The defendant made *bona fide* efforts to have the transfer registered, but the directors refused to allow it. The Company

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paid the dividends to the plaintiff, she executed the transfer, and delivered it to the defendant with a share certificate, and the defendant paid the purchase money. The plaintiff under protest paid to the defendant the dividends which she received on her shares, and on 15th January, 1901, she issued a civil bill claiming specific performance of the contract, and that the defendant should be ordered to obtain registration of the shares in his own name or for damages. When the case came before the Recorder he, of course, saw that specific performance as prayed was impossible, but he allowed the civil bill to be amended by claiming indemnity and praying rescission, and evidence having been given, he made a decree reciting that the contract was made through and in accordance with the rules of the Stock Exchange, and that registration could not be obtained, and declining to order rescission, but as the defendant offered indemnity against liability on the shares, he ordered indemnity to be given, and as the plaintiff did not accept this, he dismissed the action. Mr. Justice Madden, on the appeal, expressed the opinion that the contract was one conditional upon the Company accepting the defendant as shareholder, and that the defendant neglected a duty in not having the condition performed, and that by reason of the breach of this obligation, which he treated as a condition subsequent, the plaintiff was entitled to treat this contract at an end, and call for a re-transfer of the shares, and he ordered that the civil bill should be taken as amended to raise a claim for such relief.

The rights of parties to a contract for the sale and purchase of shares, when it is made under the rules of the Stock Exchange and according to its usages, are settled by a series of decisions in the Exchequer Chamber and Court of Appeal in England.

The obligation on the vendor is to execute and hand over to the purchaser a genuine transfer and share certificates. The purchaser then is bound to pay the purchase money, and he must take his chance of getting himself accepted as a shareholder and registered as such, and if that cannot be done owing to some clause in the constitution of the Company, or some other circumstance such as the stoppage of the Company, he cannot bring an action to recover back his purchase money on the ground of

failure of consideration, nor can the vendor obtain specific performance to compel the purchaser to register. The vendor can obtain a decree for an indemnity against present and future liability on the shares, though the purchaser is under no default as to the procuring of registration. When the contract is made under the rules of Stock Exchange, and subject to its usages, the contract is as regards both seller and purchaser complete when the acts which I have mentioned have been done, but the parties may by a condition in the contract provide that it shall be conditional on registration taking place, as occurred in the case of *Cruse v. Paine* (1), where the sale note was subject to the rules of the Stock Exchange, adding "with registration guaranteed." This decision was affirmed by Lord Hatherley (2), but the regulations in the articles in the present case do not provide for that. They go no further in my opinion than those in *Stray v. Russell* (3), and *London Founders Association v. Clarke* (4). In that case the Articles of Association provided that the directors might in their discretion admit or decline to admit as a member any person claiming by transfer of a share or shares, and in the exercise of that discretion they refused to register the plaintiff as transferee, who accordingly brought an action for a return of his purchase money, and it was held that an action was unsustainable. I do not think it could be held that the day after that decision the vendor could institute an action to have the contract rescinded, and the shares re-transferred. He had sold a chance, and the purchaser bought a chance, because the imputed terms of the Stock Exchange rules and usages made it so, and this cannot, I think, be unilateral. What then is the legal result? It is that in such a case the vendor has become a trustee for the purchaser, and that the purchaser is bound to indemnify him against all liability in respect of the shares. That was the legal result in the *London Founders Case* (4), and also I think here. In Lord Lindley's book on Company Law, at p. 499, the law is stated in a manner which I think is correct. The obligation to indemnify exists though the shares cannot be

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(1) L. R. 6 Eq. 641.
(2) L. R. 4 Ch. 441.

(3) 1 E. & E. 888.
(4) 20 Q. B. D. 576.

Appeal. registered in the name of the purchaser unless the agreement throws
 1902. the risk on the vendor. The vendor cannot obtain specific performance, but he can compel indemnity against present and
CASEY future liability, and this was the decree given in *Evans v. Wood* (1),
v. *BENTLEY.* *Hodgkinson v. Kelly* (2), and *Hawkins v. Maltby* (3), decisions
Walker, L.J. founded on this that the contract was complete, though registration had not taken place or was impossible. *Walker v. Bartlett* (4) is to the same effect.

The case is different when the contract is made outside the rules of the Stock Exchange and without its intervention. It may be that in such a case there may be regulations of the Company which make a vendor desirous of transferring his shares obliged to inform the Company of his intention to transfer and make the consent of the directors a condition precedent to the validity of the transfer. *Wilkinson v. Lloyd* (5) was such a case, and accordingly it was held there that when the consent could not be obtained by the purchaser, he could maintain an action to recover back his purchase money, and that it lay on the vendor to procure the consent of the directors, and do all that was necessary to invest the purchaser with the property, one of which conditions was the procuring of the assent. It is material to show the real grounds of the decision in *Wilkinson v. Lloyd* (5), and in *Stray v. Russell* (6) they are fully stated.

Lord Campbell (at p. 900) says—In *Wilkinson v. Lloyd* (5) the Court adopted the reasoning that the contract amounted to a sale by a partner of his share in a partnership, and that the partnership deed with regard to which the contract between the parties was entered into clearly showed that the vendor must effect all that was essential to the transfer. On this ground the Court there held that the cases applied which have been decided with respect to the obligation upon the vendor of a lease to obtain the landlord's consent to an assignment when the lease requires it; and then he points out that the contract in the case before the Court was made by a broker on the Stock Exchange according to its usages. And so Erle, J., at p. 966, states that if the contract

(1) L. R. 5 Eq. 9.

(4) 18 C. B. 845, Ex. Ch.

(2) L. R. 6 Eq. 496.

(5) 7 Q. B. 27.

(3) L. R. 4 Ch. 200.

(6) 1 Ell. & Ell. 917.

was construed only by its terms, without importing the usage of the Stock Exchange and the course of business for the vendee to execute the transfer before applying to the directors for their consent thereto, he was of opinion the vendor was bound to obtain that consent according to the case of *Wilkinson v. Lloyd* (1), and that the action for the return of the purchase money on the ground of failure of consideration was sustainable there.

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The other Judges also distinguished it, Crompton, J., saying that in *Wilkinson v. Lloyd* (1) the Court assumed that the consent to the assignment was a part of the vendor's title as in the case of the sale of a lease; but whatever may have been the case of the purchase of the partnership shares in the mines (real property to some extent) in that case, on a sale between the parties, not according to any course of business on the Stock Exchange, that did not apply to the case before him; that is, the result would be different if the Stock Exchange rules did not apply.

It seems to be clear that when the contract is not made under the rules of the Stock Exchange, but is expressly made subject to the constitution of the Company, and that constitution puts on the vendor the obligation to procure the assent of the directors, if the vendor fails to procure that assent the purchaser will be released from his contract, and the purchase money can be recovered back; while, when the contract is made on the Stock Exchange, and subject to its rules, the refusal of the directors to register the transfer is immaterial, unless by the contract registration be guaranteed.

When in a contract outside the Stock Exchange there is no stipulation putting it on the vendor to procure assent, and the directors refuse to allow registration, different opinions have been expressed. Lord Chelmsford in *Hawkins v. Maltby* (2) expresses the opinion that notwithstanding the refusal the transaction is complete as between transferor and transferee. On the other hand, Lord Romilly in *Birmingham v. Sheridan* (3), another case not turning on the rules of the Stock Exchange, decides that every contract for the sale of shares is conditional on the Company

(1) 7 Q. B. 27.

(2) L. R. 3 Ch. at p. 194.

(3) 33 Beav. 660.

Appeal. accepting the vendee as a shareholder, and where a purchaser had
 1902. been unable by reason of the stoppage of the Company to obtain
CASEY registration he dismissed a bill claiming indemnity against calls.
v. This decision of Lord Romilly has been generally treated as incor-
BENTLEY. rect, and Lord Lindley in his book on Company Law states that
 Walker, L.J. Lord Romilly himself so admitted in a subsequent case of *Fenwick*
v. Wood (1), and that learned author says that the opinion of
 Lord Romilly, that the duty to procure registration lay on the
 vendor went too far, and that in the absence of express agreement
 the purchaser takes the risk of any objection being made by the
 Company to himself as transferee.

Without entering on those questions, which arise in cases such
 as *Wilkinson v. Lloyd* (2) and *Birmingham v. Sheridan* (3), I am
 of opinion that in the present one the purchaser is bound by the
 contract as collected from the usages and rules; that the vendor
 cannot obtain specific performance—which, indeed, is not disputed;
 and that as she has been offered and declined indemnity—her
 action in the finally amended form must fail, and should have
 been dismissed.

HOLMES. L.J. :—

The shares, the subject of this litigation, were sold through
 the plaintiff's stockbroker to the defendant, who is himself a stock-
 broker on the Dublin Stock Exchange, subject to the rules and
 usages thereof. When the rules and usages of a business are relied
 on for the purpose of showing the terms of a contract, they ought
 to be proved by persons acquainted with them; and I presume
 evidence of this kind was given before Madden, J., although it is
 not reported by him. It appears, however, from the Recorder's
 decree, which is set forth in the case stated, that "the plaintiff in
 accordance with such rules as aforesaid is not entitled as a matter
 of right to enforce registration or to rescind the contract, pro-
 vided the defendant acting in good faith has endeavoured but
 failed to obtain registration by the Dublin & Glasgow Steam
 Packet Company." I presume that this declaration embodies the

(1) Not reported, 6 June, 1870. (2) 7 Q. B. 27. (3) 33 Beav. 660

result of the evidence before the Recorder; and although it is not expressly adopted by Mr. Justice Madden, he gives no other version of the usage. I therefore deal with the case on this assumption; and I do so more readily, because I gather from text-writers and reported cases that according to the custom of the London Stock Exchange, which I have always understood was in this respect identical with that of Dublin, while the only obligation imposed on the vendor is to deliver to the purchaser the certificates and a genuine transfer of the shares, the purchaser in the absence of express stipulation does not contract or guarantee that either he or his nominee will be accepted and registered by the Company as shareholder. I assume, however, in accordance with the declaration of the Recorder, that he impliedly contracts to endeavour to have the transfer completed by registration, and in doing so to act in good faith and with reasonable diligence. If this were the contract, there can be, I think, no doubt that the equity civil bill in its original form was unsustainable. The plaintiff, the vendor, was not entitled to a decree for specific performance; for it was admitted that everything that the defendant could do had been done by him; and she was not entitled to recover damages, for the only contract made by the defendant had been fulfilled. This was the view of the Recorder, who, however, allowed the plaintiff to amend her civil bill by asking that the contract be declared rescinded; and I presume—although I am not quite clear on this point—that Madden, J., decided the case not on the ground that the defendant had broken the contract, but because of an implied term that it was to be rescinded in the event of the Company refusing to register the transfer. I do not see how the case can be dealt with on any other basis, unless I assume without evidence that the defendant undertook as part of the contract of sale to have himself or some person other than the plaintiff accepted by the Company as transferee of the latter's shares. Now, there is nothing unreasonable, nor, perhaps, unusual, in introducing a condition of rescission such as I have mentioned into a contract of this kind. But where is the evidence of it in the present case? It was not expressly stipulated for; and it was not shown to be in accordance with the rules or usages of the Stock Exchange.

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Neither *The London Founders Association v. Clarke* (1) nor *Stray v. Russell* (2) could have been decided as they were if there had been an implied condition that the contract would be rescinded in the event of the Company refusing to accept as a shareholder the transferee of the shares. Such a condition would operate in favour of both vendor and vendee; and the fact that the vendee was plaintiff suing for the consideration money does not distinguish those cases from the present.

I pass over the observation that the object of the plaintiff in selling the shares was to free herself from unlimited liability, because even if this was her object, of which there is no evidence, it was not communicated to the purchaser.

The only argument seriously pressed on the Court was founded on the provision in the consolidated regulations of the Company, that it should be lawful for the directors to decline to register a transfer of shares to any person not approved of by them as transferee without giving any reason for such refusal, and thereupon such transfer should be void. Assuming, as I think I am bound to do, that what is bought and sold is the chance of being registered, I do not see how this affects the case. There was a similar provision in the Articles of Association of the Company in *The London Founders Association v. Clarke* (1), save that it did not declare that the transfer should be void; but there is no substantial difference between a void transfer and an inoperative transfer. The case of *Wilkinson v. Lloyd* (3) is relied on in connexion with this argument; but it throws no light on the question which we have to decide. That was an action to recover the purchase money of shares, the transfer of which to the vendee the Company refused to register. The sale did not take place on the Stock Exchange; and it appeared from the deed of settlement that a shareholder before transferring shares was to give notice to the Company of the name and address of the person to whom it was proposed to assign them, and should only be at liberty to assign after the directors had certified their approbation of the transferee. In these circumstances, it was held that the vendor was bound to

(1) 20 Q. B. D. 576.

(2) 1 E. & E. 888.

(3) 7 Q. B. 27.

obtain the necessary assent to the transferee being accepted as a shareholder; and, not having done so, was liable to repay the purchase money. But there is nothing in the consolidated regulations of the Dublin & Glasgow Steam Packet Company from which it can be inferred that on a sale either the vendor or vendee undertakes the duty of obtaining registration, or that the contract of sale is to be rescinded in the event of the directors declining to accept the purchaser as a shareholder.

Appeal.
1902.
CASEY
v.
BENTLEY.
Holmes, L.J.

I am, therefore, of opinion that the Recorder rightly held that the contract was not rescinded. I think, however, that he ought not, having regard to the character of the proceedings, to have declared the plaintiff a trustee for the defendant, and that the latter should indemnify the former against calls if and when she is obliged to pay them. While agreeing with him that this is at present the legal position of the parties, neither the plaintiff nor the defendant asked for this relief; and the decree ought to have been confined to what was claimed in the amended equity civil bill.

Solicitors for the plaintiff: *Hamilton & Craig.*

Solicitor for the defendant: *E. E. Merrick.*

G. Y. D.

Appeal.
1901.

June 10, 11.

BARTON, LANDLORD; MULDOON, TENANT (1).

SAME, LANDLORD; COULTER, TENANT.

SAME, LANDLORD; DAVIS, TENANT.

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—Subletting without consent—Bona fide occupation—Joint tenants or tenants in common—Separate occupation of holding—Land Law (Ireland) Act, 1896, sects. 5, 7, 11.

Four joint tenants, holding under a freehold lease, who were restrained by covenant from subletting, subdivided the holding amongst them. The lease expired in 1895. At this date three of the tenants separately worked and occupied their respective portions of the holding, but the fourth tenant was in occupation of only two acres, having sublet 153 acres, the entire holding consisting of 355 acres. There was no evidence that the landlord had given consent to the making of the sublettings; there was evidence that, having become aware of their existence, he had made no objection thereto. He received rent from the persons in occupation after the expiration of the lease:—

Held, that section 11 of the Act of 1896 did not validate the sublettings as against the lessor so as to impute a *bona fide* occupation to the tenant who had sublet, and that therefore, as all the four tenants under the lease were not in separate occupation of their respective separate portions of the holding as joint tenants or tenants in common, the three tenants who were in occupation were not entitled to fix fair rents of the separate portions held by them.

APPEALS by the landlord from the decisions of the Irish Land Commission in three several cases brought by three different tenants, in each of which the tenant was declared entitled to have a fair rent fixed upon the portion of a holding separately worked and occupied by him, the entire holding having been held by the three respondents and a fourth tenant, the application of the latter to fix a fair rent on her portion of the holding having been refused by the Land Commission on the ground that she had sublet.

By a lease, dated December 28, 1827, H. W. Barton demised

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

to Susanna Muldoon, Joseph Muldoon, Christopher Muldoon, and John Muldoon, as joint tenants, the lands of Corlaght, containing about 355 acres, for the life of Mervyn Archdale or a term of 31 years, subject to the yearly rent of £40. The lease contained a strict covenant against subletting, without the written consent of the landlord, on pain of forfeiture. The lessees divided the lands demised into four parts, each of which was practically held and worked as a separate parcel by the three tenants—the respondents in these appeals—and Margaret Muldoon as tenants in common.

The lease expired in the year 1895 by the dropping of the life of Mervyn Archdale. At this date John Muldoon, Coulter, and Davis—the three respondents—were in separate occupation of three distinct parcels forming portion of the original holding, and containing together about 200 acres; Margaret Muldoon, who represented Christopher Muldoon, was in occupation of only two acres; and the remainder of the holding, about 153 acres, was in the hands of her sub-tenants, who had fixed fair rents against her under the Act of 1881. There was no evidence that any consent by the landlord in writing or in fact was given to the sublettings at the time they were made; but it was shown by receipts for portions of the rent paid by the sub-tenants and by correspondence that the landlord was, at least as early as the year 1884, aware of the sublettings having been made, and had taken no step in consequence. On the contrary, he accepted the rent in several sums contributed partly by persons who were occupying under-tenants. In 1891 and 1894 he brought proceedings to recover the lands in ejectment for non-payment of rent, and he named the sub-tenants as defendants. In 1895 he wrote to John Muldoon: "Some of the occupiers of Corlaght pay me rent, and others do not, so I must bring an ejectment against all the other occupiers living on or off Corlaght. Please send me the names of all. It would be better for all parties if the lease was broken, and each was set his own lands." After the lease expired the landlord continued to receive the rent in the same way as theretofore.

The Sub-Commission fixed fair rents in the case of each of the three respondents, but refused to fix a fair rent in the case of Margaret Muldoon. The landlord appealed in the three cases to

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BARTON,
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Appeal. the Land Commission ; and, on their affirming the decision of the
1901. Sub-Commission, to the Court of Appeal.

BARTON,
Landlord ;
MULDOON,
Tenant.

Matheson, K.C., and Horner, for the appellant :—

The sublettings made by Margaret Muldoon were made without the consent of the landlord under section 5 (3) of the Act of 1896 ; all the joint tenants or tenants in common claiming its benefit must stand or fall together. The sublettings made by Margaret Muldoon are fatal to her being allowed to fix a fair rent, and as she cannot succeed, neither can those who hold with her as tenants in common or joint tenants. Section 11 does not apply to this case ; it applies only between middleman and sub-tenant ; if it be held to apply as between head landlord and middleman, a tenant who has sublet without the express consent of his landlord will be in a better position if he is bound by a covenant against subletting than he will be in if he is bound by no such covenant, and section 7 will be a useless piece of legislation.

Gaussen, for the respondents :—

The effect of section 11 when it applies is to validate as against the subletting tenant any subletting made in breach of covenant, unless the landlord within a reasonable time after the subletting came to his knowledge serves notice of his dissent or institutes a proceeding grounded upon the breach. If the landlord omits to take that course he is to be presumed to have actually consented in the manner required by law, and to have consented to and validated the subletting against himself and for all purposes. The full operation of the section where it applies includes three stages : (1), validation of the illegal subletting as between the parties thereto ; (2), the subletting made binding upon the landlord ; (3), an actual consent in writing by the landlord deemed to have been given. Section 7 of the Act of 1896 does not apply to the facts of this case, but refers to a different class of cases, *i.e.* where the tenant subletting is unable to show consent actual or constructive, but the portion sublet is so small that it may be disregarded. The waiver of such subletting when a breach of the contract has taken place differs from a consent to the subletting having been given. Waiver, avoiding a breach which has taken place, referred

to in section 7, assumes the act to have been a breach, but avoids the consequences. Consent, whether actual or constructive, under section 7 (Act 1896) prevents the act being considered a breach. Conduct that would not prove consent might evidence waiver. Even if section 11 has not the full effect contended for upon the facts of this case, it enables the respondents to rely upon acts amounting to actual consent. The *ratio decidendi* in *Bowman v. Catherwood* (1), requiring the consent to be in writing, was that under the then existing law the subletting was wholly illegal and the sub-tenant a trespasser: section 11 at the lowest made the subletting valid and the sub-tenant's possession lawful. The consent required by section 57 of the Act of 1881 can be inferred from acts and conduct. Non-objection to the subletting where the landlord had the right to interfere owing to the act being a breach of covenant is some evidence of consent: *Keating v. Bolton* (2). The case differs from *Maconchy v. Robertson* (3), because in that case the landlord had no power to prevent the subletting, as the lease contained no covenant against it. *Maconchy v. Robertson* (3) decided that "it was necessary to show active consent on the part of the landlord, and that mere standing by when he could do nothing to help himself is not sufficient evidence of consent." In *Maconchy v. Robertson* (3) non-objection by the landlord was held to be a neutral fact, because in that case he had no power to interfere. By reason of section 11 (Act 1896) the sublettings ceased to be an unlawful act; the respondents are entitled, as in *Keating v. Bolton* (2), to rely upon evidence from which consent shall be inferred. The evidence here relied on is that the sublettings were in existence a great length of time; each sub-tenant separately occupied and lived upon his portion; each to the knowledge of the landlord contributed a fixed proportion to the common rent. Captain Barton took the rent direct from the sub-tenants, who he knew were in occupation.

Appeal.
1901.

BARTON,
Landlord;
MULDOON,
Tenant.

LORD ASHBOURNE, C.:—

June 11.

This appeal raises an interesting and important point on the construction of section 11 of the Land Law (Ireland) Act, 1896.

(1) 28 L. R. 1r. 572. (2) 22 L. R. Ir. 143. (3) 18 L. R. Ir. 487.

Appeal.
1901.

BARTON,
Landlord;
MULDOON,
Tenant.

Lord
Ashbourne, C.

The question arises in reference to a lease made in 1827 which was determined in 1895 by the falling of the life for which it was granted, and thus expired before the Act of 1896 was passed. It is conceded that at the date of the expiration of the lease the contention addressed to us by Mr. Gaussen would have been untenable, and no suggestion could be made that, had his case been brought forward then, the landlord would not have been entitled to get clear possession. But by virtue of section 50, sub-section 2, of the Act of 1896, Mr. Gaussen claims that he is entitled to interpose now on behalf of the tenants the argument he has addressed to us on section 11 of that Act.

At the date when the lease was made—1827—there was in force the statute 7 Geo. 4, c. 29, the effect of which was to introduce into all leases made during the period while it was in operation a stringent proviso against subletting. But in addition to this statutory provision, by a strict covenant to the same effect introduced into the lease the parties expressed their agreement that this holding was not to be sublet.

The lease was made to four persons all bearing the same name, Muldoon, and the rent receipts were given to them in their joint names; but the Muldoons divided the demised lands, containing 355 acres, amongst themselves into four parts, each of which has for a number of years been practically held and worked as a separate parcel. At the expiration of the lease in 1895 the four persons who till then thus held these four parcels, and together paid the one bulk rent, did nothing towards obtaining a new lease or agreement with the landlord, but continued to work the holding as before.

However, some two or three years after the passing of the Act of 1896 they served separate notices seeking to have fair rents fixed. At the hearing before the Sub-Commission it appeared that Margaret Muldoon, who represented Christopher Muldoon, one of the original lessees, had sublet 153 acres, and was in actual occupation of only two acres, and that her sub-tenants had had judicial rents fixed against her. The Sub-Commission dismissed the application to fix a fair rent on Margaret Muldoon's portion, but fixed fair rents on the three other portions. It is worthy of notice that in the case of Margaret Muldoon's portion the decision

of the Land Commission is acquiesced in, while the landlord appealed in the other three cases. The three respondents rely upon section 5, sub-section 3, of the Act of 1896, "where a holding is held by joint tenants or tenants in common, and such tenants have worked and occupied separate portions thereof . . . the Court, on the application of any joint tenant or tenant in common, may, if they think that it is just, fix a fair rent upon the portion of the holding so separately occupied." The introductory words of this clause, "where a *holding* is held by joint tenants," emphasize the requirement of the Legislature, that what must be the matter of our consideration is the position of the entire holding—treated as one holding—held by the three respondents and Margaret Muldoon. Though Margaret Muldoon is not represented here, her portion is a very large part of the holding, and its position and condition are of course circumstances of the very highest importance in considering what are the legal incidents now attaching to the parcel of land originally demised by the expired lease. Now the position of Margaret Muldoon's portion is what has been mainly discussed before us, though it is a little curious that that is the only part of the holding as to which there is no appeal. The other three persons claiming to be entitled to parts of the holding concede that unless there is something in the Land Law (Ireland) Act, 1896, to help them, not only Margaret's portion, but their portions are outside the Land Law Acts, and they cannot get fair rents fixed. Thus, as all must stand or fall by the *status* of the portion held by Margaret Muldoon, the case raises an interesting question as to the rights of middlemen under the Act of 1896.

What is the whole object of the Land Law Acts? They were intended to benefit occupying tenants by giving them facilities for having fair rents fixed and for purchasing their holdings. But these Acts were carefully framed so as not to confer these benefits on tenants who had sublet and ceased to occupy their holdings.

There are several provisions in the code formed by the Land Law Acts in ease of tenants who have sublet. The first of these provisions is to be found in section 57 of the Act of 1881, which enacts that a tenant who sublets part of his holding with the consent of his landlord is to be deemed in occupation of his holding. That provision has been many times discussed in this Court, and it has

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been over and over again declared that the consent there mentioned must be active consent given by the landlord to the subletting; mere acquiescence on his part after the subletting has taken place will not save the tenant.

The facts proved here show that Margaret Muldoon cannot avail herself of this provision as interpreted by our previous decisions. For here there has been no active consent given by the landlord to Margaret Muldoon allowing her to make any of the sublettings she has made.

Another provision made in favour of a tenant who has sublet is to be found in the Act of 1896. It was seen that though the tenant might not be in occupation of his entire holding, his sublettings might be so unimportant as still to leave him the bulk of the holding, and, in order that he might not have his rights forfeited by a comparatively small subletting, provision has been made in his favour by section 7, sub-section 1 (b) of the Act of 1896.

By this it is provided that for the purposes of the Land Law Acts the tenant of a holding shall be deemed to be in *bona fide* occupation thereof notwithstanding that any part of the holding is—otherwise than in breach of the contract of tenancy or of a statutory condition—sublet to another person, provided that a part not less than seven-eighths in value of the holding remains in the occupation of the tenant, and that the subletting was made prior to the Act of 1887.

The effect of this provision is practically to declare that a tenant is not to be disqualified from obtaining the benefit of the Acts if he has sublet only one-eighth of his holding; but this extenuation of the rigour of the provisions against subletting is allowed only where the subletting is not in breach of contract or of statutory condition, with, however, the further concession (contained later on in the same section) that a breach of the contract of tenancy shall not be deemed to have taken place if the landlord waived such breach. This provision only needs to be stated to show that the present case does not come within it, for here upwards of one-third of the holding has been sublet.

Mr. Gaussen, however, contends that there is a further provision in the code in ease of tenants who have sublet; and he argues that

a much wider relaxation of the provisions excluding middlemen from the Acts than the two exceptions to which I have referred is to be found in section 11 of the Act of 1896.

That section was, however, introduced *diverso intuitu* altogether. It was not enacted in ease of middlemen, but in order to protect their sub-tenants. It had been found that cases of hardship had arisen from the strictness of the statutory provisions against subletting, which enabled middlemen to repudiate their own contracts as void, to turn round on their own sub-tenants, and to treat them as having no rights.

Section 11 applies itself to prevent this injustice, and provides, in its first clause, that a contract of tenancy entered into in breach of the subletting Act, or of an agreement against subletting contained in a lease, shall not *as between the middleman and the sub-tenant* be void or voidable; the object of the Legislature was to prevent a middleman from destroying the rights of the sub-tenants he has called into existence. But if the tenant of the middleman is to be safeguarded during the tenure of the middleman, it was necessary for the Legislature also to curtail the right of the head landlord to disturb the sub-tenant pending the middleman's lease, and this is the scope of the latter part of the section. Mr. Gaussen seeks to read the latter clause of the section apart from the former, and quite divorced from its context. He argues that it is to be not only a protection to the sub-tenants, but also a charter giving new rights to the middleman who has violated his own covenant. To adopt this mode of interpreting the section would confer on middlemen who have violated the terms of their deliberate contract rights which are denied to middlemen who have violated no contract. What would be the object of the carefully drawn provision in the earlier portion of the Act, section 7, that seven-eighths of the holding must be retained in the middleman's hands, if we were to yield to this argument? Section 11 was intended to give a wider measure of relief to occupying tenants—sub-tenants of a middleman—and it must be given the fullest scope to carry out its own purpose. But it is plainly opposed to the meaning of the rest of the statute to read it as conferring a new charter on middlemen.

Section 11 therefore does not help the respondents. It confers

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BARTON,
Landlord;
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Tenant.

Lord
Ashbourne, C.

Appeal. no right on Margaret Muldoon. I am of opinion she was right
 1901. in not appealing, and, as I have said, the considerations which
 BARTON, affect her *status* are applicable to the entire holding, and therefore
Landlord; the appeal must be allowed.
 MULDOON,
Tenant.

FITZ GIBBON, L.J. :—

Meredith, J., observed that he did not think the landlord was far from wrong in saying, as he did in his evidence, that this was one of the most complicated cases which had ever come before the Land Commission, and he doubted whether either the Sub-Commission or the Land Commission had got to the bottom of it. I am not satisfied that we have got very satisfactorily to the bottom of it either. It depends upon the Land Act, 1896, section 11. The construction of that section must be the ultimate goal of the long course of shadow-hunting in which we are obliged to search for the character to be imputed to a putative occupier at an imputed date.

The Sub-Commission did not arrive at a consistent conclusion, for there is no ground upon which Margaret Muldoon's *status* can be made different from that of the other three lessees. If they are present tenants entitled to fix a fair rent, she also must be so. The question is whether all or none of the tenants under the lease of 1827 can fix a fair rent.

The lease came to an end by the death of the *cestui-que-vie* in 1895. It was made to four lessees as joint tenants, reserving one rent, and containing a strict covenant against alienation. The case is important, because such leases were at one time common. I remember meeting one on a Sligo estate, in which a large tract of land was demised to more than fifty lessees, each occupying separately, but all liable to one bulk rent. The object of such lettings was to make the whole rent recoverable from each and every tenant, and out of every portion of the demised lands. It is proved that the holding demised by this lease was separately occupied and worked in distinct bits; that this state of affairs had existed for many years, probably from the date of the lease; since 1884 the present landlord had been aware that under-tenants were in occupation of part of the holding. Furthermore, he was aware, though perhaps not so early in date, that the people from

whom he accepted contributions towards the rent included some occupying under-tenants as well as tenants. But throughout the term the demised lands continued to be one holding, held at a single rent, and subject to a clause against alienation.

The lease having expired in 1895, how comes it that we have to discuss the rights of the occupiers in respect of benefits conferred by a statute which did not pass until 1896? Here enters shadow No. 1. It is conceded that the tenants would have no rights but for the Act of 1896, section 50 (2) :—

“Where a tenant would, if this Act had been in force at the passing of the Land Law (Ireland) Act, 1881, be now a present tenant, and . . . the landlord has not, since the passing of the said Act . . . resumed possession of the said holding . . . the tenant *shall be deemed a present tenant*,”

for the purpose of an application to fix a fair rent of the holding. The landlord from 1895 has allowed things to take their course; he has not resumed possession; he has evicted nobody; he has taken no step to prevent the occupiers from being deemed present tenants under the Act of 1881. Therefore we must go back to the Act of 1881 to look for a foundation for the tenants' claim. Unless they get the *status* of present tenants under the Act of 1881, section 21, they cannot have it. Under that section they can get this *status* only if they were “in *bona fide* occupation” of the holding at the expiration of the lease. “*Bona fide* occupation” has been held to mean honest as distinguished from colourable occupation, and the entire leasehold must be so occupied. Here the lessees were admittedly not in actual occupation, because Margaret Muldoon had sublet 153 acres. How do the tenants seek to get over this? By shadow No. 2, introduced by the following clause of section 57 :—

“Where the tenant sublets part of his holding with the consent of his landlord, he shall, notwithstanding such subletting, *be deemed* for the purposes of this Act to be still in occupation of the holding.”

McCarthy v. Swanton (1) decided that “*bona fide* occupation” for the purposes of section 21 included the honest occupation of

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an under-tenant, imputed to the tenant by section 57, when the subletting had been made with the consent of the landlord. But that consent must have been given to the act of subletting. Apart from the Act of 1896, the consent must be something more than doing nothing to prevent the subletting—something more than not objecting to the subletting after it had been made. It must be “active consent.” Therefore these tenants cannot come in under section 21 unless they can show that Margaret Muldoon had the active consent of the landlord to the sublettings which she made. There is no evidence that he consented, actively or otherwise, before or at the date of the sublettings. There is evidence that he subsequently became aware of them, and that he acquiesced in them, but nothing more. There is no evidence that they existed before the lease. If there were, *Flannery’s Case* (1) might apply. There is no such evidence as was given in *Keating v. Bolton* (2), where the conduct of the landlord’s agent, if not treated as sufficient evidence of previous consent, would have been so misleading as to amount to positive deceit. In *Kennedy v. Essex* (3) I read the evidence given in *Keating v. Bolton* (2) to show that the decision there turned upon considerations of so-called “estoppel” by conduct, which do not exist here. Apart, therefore, from the Act of 1896, the evidence of consent to the sublettings fails, and the lessees cannot be deemed to have been in *bona fide* occupation of the holding at the expiration of the lease.

I return to the Act of 1896. Section 5 (3) says:—

“Where a holding is held by joint tenants or tenants in common,” (i.e. to use the Chief Baron’s expression, by ‘a conjunct tenant’), “and such tenants have worked and occupied separate portions thereof, and the division of the holding was made prior to the passing of the Land Law (Ireland) Act, 1887, the Court, on the application of any joint tenant or tenant in common, may, if they think that it is just, fix a fair rent upon the portion of the holding so separately occupied.”

Speaking for myself, having regard to the different wording of section 7, my present impression is that this clause does not

(1) 20 L. R. Ir. 527.

(2) 22 L. R. Ir. 143.

(3) 28 L. R. Ir. at p. 593.

empower the Land Commission to fix a fair rent on one portion of a holding of which the whole is not within their jurisdiction. But that question may be reserved for consideration in some future case. Under section 7 we have to resume the "deeming" process,

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Landlord;
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Tenant.

Fitz Gibbon,
L.J.

"(1) For the purpose of the Land Law Acts, the tenant of a holding shall be deemed to be in *bona fide* occupation thereof notwithstanding . . . (b) that any . . . part of the holding is, otherwise than in breach of contract of tenancy or of a statutory condition, sublet to or in the occupation of another person,"

if certain conditions are fulfilled. This enactment is *in pari materia* with the Act of 1881, section 21, and creates an imputed occupation which may be available to satisfy section 21. But it gives no relief where the subletting is in breach of the contract of tenancy, and therefore cannot help the respondents here. But, furthermore, it imposes conditions: the tenant can not be deemed to be in *bona fide* occupation "unless in the estimation of the Court a part not less than seven-eighths or thereabouts in value of the holding . . . remains in the *bona fide* occupation of the tenant." In this latter place the occupation must plainly be the actual occupation of the tenant himself, as contrasted with the imputed occupation of a sub-tenant. The provision is a continuation of the policy of the Legislature against middlemen, which is evidenced throughout the Land Acts; it is only under special restrictions that middlemen can fix fair rents; the code, as a whole, gives that right to occupying tenants only. The benefit of section 7 is restricted to cases where the subletting is not in breach of the terms of the tenancy, and where, in addition, the middleman retains in his own occupation seven-eighths of his holding. I base my decision against the respondents upon the ground that the Act of 1881, section 21, even as expanded by section 57 of the same Act, and by the Act of 1896, section 7, gives the benefit of the Land Law Acts, in cases of subletting, only to middlemen who have sublet with the consent of the landlord, or without any breach of the terms of their tenancy, and who have retained seven-eighths in value of their holdings in their own occupation, and who had sublet before the passing of the Act of 1887.

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Landlord;
MULDOON,
Tenant.

Fitz Gibbon,
L.J.

Thus I approach the consideration of section 11 of the Act of 1896 with a strong presumption against the probability of finding the limited provisions in favour of middlemen who have not broken their agreements, followed by provisions more favourable to those who have done so. Section 11 says:—

“A contract of tenancy entered into, whether before or after the commencement of this Act, by a landlord” (meaning a middleman) “in violation either of Geo. 4, cap. 29, or of an agreement against subletting in his lease, shall not *as between him and the tenant holding under such contract*” (meaning the subletting) “be, or be deemed to have been, void or voidable, and a superior landlord shall be deemed to have expressed a sufficient consent, in the manner in which the consent is required by law to be expressed, to a subletting made in violation of such Act or agreement, unless within a reasonable time after the subletting came to the knowledge of himself, or his agent, he served on the lessee or sub-tenant notice of his dissent from the subletting, or instituted a proceeding against the lessee founded upon the said violation.”

The first clause merely prevents the middleman from taking advantage of the decision in *Gillman v. Murphy* (1), and its operation is expressly limited to the middleman and the sub-tenant. Mr. Gaussen tried to divorce the second clause from the first, and to make it operate independently and authoritatively against the head landlord in favour of the middleman. But this interpretation is open to two objections: (1) it involves the extreme improbability of making a more favourable provision for a middleman who had broken his contract than that which section 7 had made for those who in subletting broke no contract; and (2) the words “as between him and the tenant holding under such contract” in the earlier clause would be unmeaning if the imputed consent of the superior landlord were to be deemed absolutely binding under the second clause. The reasonable and consistent interpretation of section 11 is, in my opinion, that which makes the second clause ancillary to the first, and confines the operation of the whole section to middlemen and their sub-tenants, with a possible extension of the second

clause to the superior landlord during the continuance of the middleman's tenancy. The imputed consent may, perhaps, protect the sub-tenant until the middleman's tenancy ends, but afterwards it cannot give the middleman an imputed *status* as "a present tenant" which he would not otherwise have. Construed thus, section 11 is consistent with section 7, and there is an ample field for its operation. There are many occupiers in the same plight as Margaret Muldoon's sub-tenants; they get the benefit conferred by section 11 absolutely as against the middleman, and in this very case they have been enjoying statutory tenancies for some years as against Margaret Muldoon. It is also possible, but this must be reserved for future consideration, that they may be entitled to remain in occupation as against the superior landlord, either absolutely, or at least until the mesne tenancy comes to an end. Thus tracing the clue through this maze of "deeming" clauses, the judicial Ariadne comes to a conclusion which seems reasonable, if not absolutely clear, leaving the landlord the right which was recognised in *Bowman v. Catherwood* (1) and *Kennedy v. Essex* (2), of refusing the *status* of "a present tenant," after the expiration of a lease, to tenants who have sublet in breach of the terms of their tenancy, and without the consent of the landlord, even though he has not gone to the extremity of evicting them for so doing, or has not prophetically taken the steps mentioned in section 11 of the Act of 1896.

Appeal.
1901.

BARTON,
Landlord;
MULDOON,
Tenant.

Fitz Gibbon,
L.J.

WALKER, L.J.:—

In this case Mr. Justice Meredith decided in favour of the tenants by the application to their case of the 11th section of the Act of 1896—a section which he points out is difficult to construe. There is no dispute as to the facts. The holding had been held under a lease of 28th December, 1827, by four persons as joint tenants, and long prior to the passing of the Land Act, 1887, the three tenants who are concerned in the present appeal had worked and occupied separate portions of the holding as tenants in common with others. Another portion, consisting of

Appeal. 153 acres, had been in the occupation of Margaret Muldoon, but
 1901. she many years ago sublet all her portion save two acres, and on
 BARTON, the 5th December, 1895, when the lease expired, Margaret
Landlord : Muldoon was not in *bona fide* occupation to the extent of 153
 MULDOON, acres.
Tenant.

Walker, L.J. At the expiration of the lease, and until at all events the Act of 1896 became law, no one of the tenants in common could have fixed a fair rent in respect of his undivided share, and the conjunct tenant of the holding could not have done so, because that conjunct tenant was to the large extent I have mentioned not in *bona fide* occupation of the holding.

The lease contained a strict covenant against subletting on pain of forfeiture, and it was, moreover, made at a date (1827) when such a covenant would be implied by law. There is no ground for suggesting that any consent in fact was given to the sublettings at the time they were made, even if such consent would be of any operation, and there is still less ground for suggesting that any consent was given in the terms of the covenants or of the Subletting Acts. There is no doubt, however, that the landlord knew of the sublettings within (I assume this) the language of section 11. We start, however, with this: that a part was sublet to an extent which prevented Margaret Muldoon or the conjunct tenant from alleging that seven-eighths in value of the holding remained in occupation. Seven-eighths of the whole would be over 300 acres. I think it is plain the application of the tenants could not be sustained under sub-section 3 of the 5th section of the Act of 1896. "Holding" in it must mean the entire holding, and as such it was a disqualified one. The question must turn upon the 11th section combined with section 50. For the purpose of ascertaining the answer we must, I think, first see what is the effect of the 7th section of the Act of 1896 on the position of the tenants in this case.

The prior legislation is important. By the 57th section of the Act of 1881 a tenant who sublets with the actual consent of his landlord is deemed to be still in actual occupation.

This benefit was extended by the Act of 1887 to a subletting made without consent, provided the subletting was made before that Act, and itself of a trivial character, so that the tenant was

substantially in occupation. There was a further extension of this benefit by the 7th section of the Act of 1896, under which a tenant is deemed to be in occupation of his holding, notwithstanding that a part is sublet, provided there was left in his occupation a part not less than seven-eighths in value of the whole, and the subletting was made before the passing of the Act of 1887. This, of course, on the area here would not include the tenant, and there is the further limitation to the right given by the 7th section that the subletting shall not be in breach of the contract. If it were the 7th section would not apply at all, but there is the proviso that if the landlord waived the breach of the contract, it shall be deemed that the breach has not taken place, and then the tenant is deemed to be in *bona fide* occupation, but only if he has retained the seven-eighths.

Thus we have careful legislation dealing with the question how far subletting can exist, and yet occupation be attributed to the tenant both in the case where there is no contract prohibiting subletting, and where there is, a very qualified protection in this latter case being given to the tenant who broke his contract.

It would *prima facie* be strange if we found four sections later on a provision which would absolve altogether the tenant who breaks his contract, irrespective of the date of the creation of his tenancy or otherwise, from the consequences of subletting, while it leaves the tenant who does not break it in the position in which the 7th section left him. There was, however, another case not up to this provided for, viz. that of a tenant having possession under a contract created by a middleman, the infirmity of which was that title under it failed by reason of the Subletting Act, or by reason of the contract affecting the middleman's interest established to be law in *Bowman v. Catherwood* (1), followed by this Court in *Smyth v. Edie* (2), decided in May, 1893. Now, a provision to remedy that case and help such an occupier would naturally find a place in the Act without overlapping or making redundant anything already provided for in the 7th section. The question is whether this is not the fair meaning of section 11.

Appeal.
1901.

BARTON,
Landlord;
MULDOON,
Tenant.

Walker, L.J.

(1) 28 L. R. Ir. 572.

(2) 27 I. L. T. R. 86.

Appeal. There are two branches of section 11—one declares the agreement
 1901. for subletting shall not be deemed void or voidable. So far it
 BARTON, is expressly confined to the relation between middleman and
 Landlord; sub-tenant. The second branch of the section seems to me only
 MULDOON, to express the legal mode by which effect is to be given to the first
 Tenant. branch if the conditions are complied with. The contract shall
 Walker, L.J. not be deemed void or voidable, because consent in the required
 manner shall be deemed to have been given. This second branch
 saves the superior landlord in some cases, and qualifies where the
 circumstances exist the words “void or voidable,” making the
 legislation complete, so that it is to a great extent a limitation on
 that avoiding, which is expressly confined to the rights between
 mesne landlord and sub-tenant.

This construction furthers legislation in favour of occupiers, while it leaves middlemen as they were under the 7th section, and it is, I think, the true intention to be collected both from the policy and language of the Act.

HOLMES, L.J. :—

The three applicants, together with a fourth whose application to fix a fair rent was dismissed by the Sub-Commission, and who did not appeal, had vested in them the lessees' interest under a lease which expired in 1895. Although the landlord was in the habit of taking the rent as he could get it, partly from one and partly from another, he always dealt with the premises as held under a single demise by the four persons aforesaid as joint tenants or tenants in common. The three applicants now before the Court had for a long time before the fall of the lease worked and occupied separate portions of the holding, their occupation being actual and *bona fide*. The remainder of the holding was regarded as the share of the fourth; but she had let the greater part of it to under-tenants. The acreage so sublet amounted to more than one-third of the entire holding; and there is no evidence that these lettings were made with the actual consent of the landlord. When the lease came to an end in 1895 a fair rent could not have been fixed either for the whole or any portion of the holding; and the present applications, if they can be

sustained at all, must be brought within the provisions of the Land Law (Ireland) Act, 1896.

As the landlord has not resumed possession since the determination of the demise, the applicants are entitled by the 50th section of that Act to rely on its provisions as if they had been enacted in 1881 and formed part of the statute of that year. Under these circumstances, each applicant rests his case on section 5, subsection 3, which enables a joint tenant or tenant in common who has held and worked a separate portion of the holding to have a fair rent fixed for such portion, if the Land Commission thinks it just so to do. But this provision taken by itself does not help the applicants, inasmuch as the subletting by the fourth joint tenant or tenant in common would still be a fatal objection to fixing a fair rent for any portion of the holding.

To get rid of the effect of such subletting, the applicants rely on the 11th section of the Act of 1896, which provides that a contract of tenancy entered into by a landlord in violation either of the Subletting Act or of an agreement against subletting in his lease shall not, *as between him and the tenant holding under such contract*, be, or be deemed to have been, void or voidable, and a superior landlord shall be deemed to have expressed a sufficient consent in the legal manner unless he has taken certain steps therein prescribed. As the lease in this case was not only made when the Subletting Act was in force, but also contained an agreement against subletting, it is necessary to consider the foregoing section. Confining myself to its own language, without reference to other sections, I should hold that it was intended to protect the subtenant against his immediate landlord, but not to interfere with the rights of the superior landlord. The words "as between him and the tenant" would be otherwise unintelligible, and I think it impossible to confine them to the first branch of the section. If this is the view to which a consideration of the section taken by itself would lead me, the 7th section seems to me to place the matter beyond all doubt. The object of that section was to prevent subletting of a comparatively nominal character from being an objection to fixing a fair rent; and for this purpose it provides that the tenant shall be deemed to be in *bona fide*

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BARTON,
Landlord;
MULDOON,
Tenant.

Holmes, L.J.

Appeal. occupation notwithstanding a part of the holding of a strictly
1901. limited extent is sublet. There is, however, excluded from this
BARTON, advantage a subletting in breach of the contract of tenancy, or
Landlord : of a statutory condition, unless where such breach of the contract
MULDOON, has been waived.
Tenant.

Holmes, L.J. It would pass the wit of man to explain how such a section could be made part of the same statute as the 11th section if the last-mentioned proviso bears the meaning given it by the Land Commission.

Solicitor for the landlord: *A. Stubbs.*

Solicitor for the tenants: *King-Houston.*

G. Y. D.

TUTHILL v. TUTHILL.

M. R.
1902.

Feb. 17.

*Practice—Infant—Appointment of trustees—Beneficial possession of land—
Undivided share—Contingency—Form of summons—Conveyancing and
Law of Property Act, 1881 (44 & 45 Vict. c. 41), sects. 42, 43.*

Under the will of a testator an infant was, in the events that happened, entitled to receive one undivided share of the income of real estate with remainder in an undivided share of the fee-simple of the lands, contingent—(1) on surviving his father, and (2) on attainment of twenty-one or marriage. The trustees of testator's will were directed to pay his share of income to the infant, but had no power of sale of the settled land, or of consenting thereto:—

Held, that the trustees of the will did not come within the enabling provisions of section 43 of the Conveyancing and Law of Property Act, 1881, and that the Court had power to appoint them trustees for the purposes of section 42 of the Act to enable them in their discretion to apply the share of income, and accumulations thereof, to which the infant was entitled for his benefit.

ORIGINATING SUMMONS.

By his will Charles Tuthill devised certain real property to the defendants, whom he appointed trustees and executors of his will, upon trust to hold for the use of his son Ferguson and his family, and he directed them to receive the rents thereof and to pay same to his son Ferguson during his life, or until he should assign or charge the same or become insolvent; and the testator provided that in such case the said rents should be paid to his son's wife and children in equal shares during his life, and that on his death such lands should be divided equally in fee-simple between his wife (if she survived him) and such of his children who were living (or had died leaving lawful issue) at his death as tenants in common, the share of any child not to vest until such child attained the age of twenty-one years, or married, the children of a deceased child to take the share of their parent among them in equal parts. The will also provided that if any child of his said son should survive him, but should happen to die before age or marriage, the

M. R. share of such child should be divided equally in fee between such
1902. of his or her brothers and sisters as should take vested shares as
TUTHILL aforesaid. The testator died 11th February, 1888, and his will
v. was duly proved. In 1897 the trustees, having received notice of
TUTHILL. the insolvency of Ferguson Tuthill, discontinued payment of the
rents of the real estate to him. From that date the trustees paid
one undivided share of the income to the wife of Ferguson Tuthill,
and one undivided share to each adult child respectively. Three
of the children were still under age, and their shares of the income
had been allowed to accumulate, and were represented by a sum
of £55 2s. 7d. Bank of Ireland Stock.

The three infant plaintiffs (who resided in Ballarat, Australia, with their parents), suing by their next friend residing in Leinster-road, Dublin, issued an originating summons intituled in the trusts of the will of Charles Tuthill, deceased, and in the matter of the Conveyancing and Law of Property Act, 1881, in which the trustees of the will of Mr. Tuthill were named as defendants. The summons asked for an order—(1) That the said defendants might be appointed trustees for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881, of the three undivided shares in the lands, to the rents and profits of which the plaintiffs were under the trusts of the above-mentioned will beneficially entitled during the lifetime of their father, with contingent interests in undivided shares of the fee-simple on his death. (2) For an order authorizing the defendants to pay the accumulations and future income of the said three undivided shares to the rents and profits of which the plaintiffs were entitled to Mrs. Tuthill, the mother of the plaintiffs, or otherwise apply the same for their benefit.

The eldest infant plaintiff was aged nineteen, the second fifteen, and the youngest twelve.

There were affidavits in support of the application by the father and mother of the infants and by one of the defendant trustees.

Mrs. Tuthill's affidavit contained statements showing the desirability of payments being made to her for the purpose of education and maintenance of the infant plaintiffs, and she undertook to apply any sums paid to her out of the income and accumu-

lations to which they were entitled for their benefit in equal shares. Mr. Ferguson Tuthill in his affidavit assented to the proposed payment to Mrs. Tuthill, and stated that he did not require any notice to be given to him of any application to the Court or Judge for an order to that effect.

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The affidavit of one of the defendant trustees stated his belief that it would be advantageous to the infant plaintiffs that he and his co-trustee should have a discretionary power to apply their income and accumulations for the maintenance, education, or benefit of the infants, either directly or by payment to their mother, and stated the desirability of him and his co-trustee having all powers of management conferred by section 42 of the Conveyancing and Law of Property Act, 1881, so far as related to the undivided shares of the infants. The affidavit also asked that, if necessary, the Court might be pleased to sanction the application of the accumulations and future income of the infants' shares for their benefit.

R. W. Lucas, in support of the application :—

The infant plaintiffs are entitled to their undivided shares of the income of the real estate settled by the will as it accrues, and they are entitled to their respective shares of the accumulations thereof, which have been invested by the trustees of the will; but there is no person to whom the trustess can safely pay, and they have no power otherwise to apply the same for the benefit of the infants. They have no power to apply the income or accumulations for the benefit of the infants; because section 43 of the Conveyancing and Law of Property Act, 1881, is limited to cases where property (that is, the *corpus* of the estate) is held in trust "for an infant either for life or for any greater interest," or where an infant is entitled absolutely or contingently to the property on attaining twenty-one, or on the occurrence of an event before attaining that age. Here the right of each child to an undivided share in the *corpus* of the estate depends on a double contingency. In such case the provisions of sect. 43 do not apply: *In re Judkin's Trusts* (1). "Property" cannot mean income. The section never

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meant to give trustees merely power to apply the *income* of income. See the observations of Messrs. Hood and Challis on the Conveyancing Act, 1881, p. 123. At any rate, "property" cannot bear the meaning of income, but must be restricted to capital, in the present case: *Humphreys v. Levett* (1).

Neither do the trustees come within the enabling provisions of section 42 of the Act; because, under the will of Mr. Tuthill, they have no power of sale, or of consent thereto, nor, indeed, any power of management over the property further than the direction to pay the rents in a certain way. There are, therefore, no trustees appointed for the purposes of the section; and so the Court has, under the section, power to appoint trustees for its purposes. The infant plaintiffs are persons "beneficially entitled to the possession of the land," because "land" includes an undivided share of land, and "possession" includes receipt of income, sect. 2 (ii) (iii): they are, consequently, entitled to have trustees appointed for the purposes of the section.

[THE MASTER OF THE ROLLS:—Section 42 says the Court may appoint trustees "on the application of a guardian or next friend." In this case the infants are plaintiffs. I suppose you say that it is the same as if the application were made "by the guardian or next friend"].

Yes. The form followed is that adopted in *Re Glover* (2), a case in this Court. In England the same form was adopted in *Clay v. Clay* (3), apparently the earliest reported case as to practice. And see Daniell's Chancery Forms, pp. 1225, 1226, and Seton on Decrees (5th ed.) p. 1019. *Re Cowley* (4) follows the decision of law in *Re Glover* (2), but does not adopt the same form of summons.

[THE MASTER OF THE ROLLS:—I think you are entitled to have an order appointing the defendants trustees for the purposes of section 42 of the Conveyancing Act, 1881, but I will not make an order authorizing the defendants to pay over accumulations and future income].

The appointment of the defendants as trustees for the purposes of section 42 will give them requisite power, which they

(1) [1893] 3 Ch. 1.

(2) [1899] 1 I. R. 337.

(3) 30 Sol. Journ. 619.

(4) [1901] 1 Ch. 38.

must use according to discretion. The second prayer in the summons is an alternative appeal to the general or original jurisdiction of the Court.

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THE MASTER OF THE ROLLS made an order appointing the defendants trustees for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881, of the undivided shares of lands to the rents and profits of which the infant plaintiffs were entitled.

Solicitor for the plaintiffs: *A. Tuthill.*

R. W. L.

IN RE THE SECRETARY OF STATE FOR WAR AND
HENRY PERCY, AND DEFENCE ACTS AND
ATHLONE RIFLE RANGE.

M. R.
1902.

Feb. 5.

Compensation—Lease of lands—Yearly rent—Clause of surrender—Notice to treat—Compulsory acquisition—Basis of value—Arbitration.

P., owner in fee, demised lands in 1887 to the Secretary of State for War for twenty-one years at a rent of £43, with clause of surrender at the end of seven or fourteen years. In 1898 the Secretary of State for War served notice to treat:—

Held, that the compensation payable to P. in respect of the reserved rent should be assessed on the basis of a purchase at a point of time immediately before the notice to treat, and should be valued at the rent reserved upon a lease for the residue unexpired of a term of twenty-one years, taking into account the likelihood of the lease being sooner determined, and that all the circumstances of the case and the holding should be taken into consideration, and that the arbitrator should find the reasonable value of the rent to be purchased on the basis of what a purchaser would have given for it immediately before the notice to treat.

Semle—20 per cent. is an unreasonable addition for compulsory taking.

MOTION on behalf of the Secretary of State for War, that it may be declared that the assumption contained in the award of Arthur Edward Joyce, the umpire duly appointed and acting under a submission to arbitration, wherein Joseph Abbott was

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duly appointed arbitrator on behalf of the said Secretary of State, and Robert English was duly appointed arbitrator on the part of the said Henry Percy, that the lease under which the lands are held could be determined on the 1st April, 1901, is not right in law, and that the said award may be remitted to the said umpire to strike out such parts as the Court may declare to be contrary to law, or otherwise to amend the said award, and if necessary to re-execute the same. The facts of the case and the arguments of counsel are sufficiently referred to in the judgment.

Vesey Fitzgerald, for the Secretary of State of the War Department, in support of the application.

O'Connor, K.C., for Henry Percy.

O'Connor, K.C. and *J. B. Burke*, for Mrs. Fitzgerald, another owner of land.

Bowen, for Mrs. M'Weeny, another owner.

Drummond, K.C., and *Law Smith*, for Morgan and Ramsay, other owners.

THE MASTER OF THE ROLLS:—

On the 17th of November, 1898, the Secretary of State for War served a notice to treat in reference to the compulsory acquisition of certain lands on Mr. Percy—I take *Percy's Case* as typical of all—and in it the notice to treat was in respect of 16A. 2R. and 3P. to be absolutely purchased, and described as being in occupation of the owner, Henry Percy; and if there were nothing more in the case, there would be no question to determine, because that means the purchase in fee-simple, and the duty would be cast on the arbitrator of ascertaining the value of the fee-simple, as of that date, viz. November, 17th, 1898. But a question arises as to the valuation by the arbitrator under these particular circumstances, because Percy is not the owner in fee-simple, but is the owner in fee, subject to an outstanding lease for twenty-one years. The lease is dated July 3rd, 1888. There is some confusion as to the date. Originally

the lease was engrossed as of 1887, but it is altered to 1888. It contains covenants applicable to a lease of 1887, for instance, that the first payment of rent is to be on the 1st of October of that year. It also contained a clause of surrender at the end of seven or fourteen years, upon which the present question mainly turns. I shall not read the leases in the other cases in regard to which there is the same question, because counsel stated that they all contain similar provisions. The lease in *Percy's Case* was made to the Secretary of State of the War Department, and he is also now the purchaser of the fee-simple. If it were not for that fact, there could be no question as to what principle of compensation should be adopted. If the rent reserved by the lease was a rack rent, much more if it were an excessive rent, being a beneficial lease to the lessor, it must be so considered by the arbitrator; and as he had a right to receive the rent for seven or fourteen or twenty-one years, the arbitrator would have to say what the probabilities of the case are as to the lease, whether it is certain to be held for the whole of the twenty-one years, and if, on the other hand, owing to local or other special circumstances or from the fact that other lands could be got for less rent, there would be a likelihood that the lease would be surrendered, the arbitrator would be bound to take that into consideration. As was extremely well put by Mr. Burke, if in the circumstances of this case it was practically certain that the War Office would keep the lands till the end of the lease, and it were for their interest as representing the public to do so, that would be a circumstance which the arbitrator could not ignore. But Mr. Fitzgerald, as representing the Secretary of State for War, takes a different position. He says that on service of the notice to treat the Secretary of State for War became in equity the purchaser of the whole interest of Percy, including his interest as reversioner in the lease, and from that instant became owner of the lease and owner of the reversion; and that therefore it would be ridiculous to require him to serve a notice of surrender on himself to take effect in 1901, or on Percy, whose interest, though subsisting at law, was wholly gone, for the purposes of fixing compensation in this Court. And he says that it would be so immensely for his interest to serve a notice of surrender, that it must be assumed that he did this, and

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that thus there was practically a surrender of the lease by the Secretary of State for War. He relies on the principle of the decision in the House of Lords, that when the same person is vendor and purchaser the obligations under the lease are altogether gone. He must, however, go a little further than that as regards the arbitration; because if the clause of surrender and all the covenants in the lease are gone, then the rent is gone also, and the arbitrator is bound to deal with the land as free of rent, which would amount to an estate in possession. That would be a good way of getting at the lands for less than is paid for it in rent, apart from the circumstance that Percy is entitled to a beneficial lease. But is that a sound application of the law? It is not; because though the service of the notice to treat makes the Secretary of State the equitable owner of the lands, the interest he takes is subject to the lease, and the assessment of compensation is not to be made as of a date subsequent to the service of the notice to treat, but the circumstances are to be considered as they existed at the date of the notice, that is immediately before its service. That was the very case in *Penny v. Penny* (1), referred to by Mr. Bowen; and *Earl of Eldon v. North Eastern Railway Company* (2) is an authority for the proposition that if the land which is being taken is likely to continue to produce the rent which is being paid for it, the rent does afford a basis on which the value may be calculated. And it may be said that the person who was in receipt of the rent got an extremely good tenant in the Secretary of State for War, one who would pay his rent punctually, and ask for no reduction, under a lease which might last for nearly fourteen years, and that thus the lessor could not be treated as if he were merely the owner of lands worth £10 or £15 a-year for grazing purposes. He must be treated in reference to compensation as the matter stood at the service of the notice to treat, not after its service, but at the moment before it was served, and he must have the full benefit of the state of facts existing at that point of time.

The arbitrator in his carefully prepared award assessed compensation on three different assumptions: first, on the assumption

(1) L. R. 5 Eq. 227.

(2) 80 L. T. (N.S.) 723.

that the notice to surrender the lease should be taken as served at the expiration of the earliest term, that is, of the first seven years, and he has taken the value of the rent, £43 11s. 9d., at 2·29 years' purchase. He, secondly, deals with compensation on the assumption that the lease should be treated as one which would last for the second term, and he gives 7·42 years' purchase for the rent; and, thirdly, he proceeds on the assumption that the tenancy should be treated as a perpetual one, and valued at twenty years' purchase.

If the notice to treat put an end altogether to the lease, the matter could not be dealt with in any one of these ways. In the view I take I cannot say as a matter of law that either the first, or second, or third basis of compensation must be the correct view. Any one of them may be so in point of fact. The arbitrator is bound to take into consideration the position of the lessor immediately before this notice to treat; and finding that he was the owner of the lease, and that the Secretary of State for War, the tenant, has become the owner in fee of the lands which were subject to the lease, he is bound to take all the circumstances into consideration, and say whether it is likely that the lease would have been put an end to in two and a-half years or in nine years and a-half, or whether it was value for twenty years' purchase. That is a matter for him, taking all the circumstances into consideration. I should myself say that it is highly probable that the lessor's interest was more valuable than the first calculation would make it out to be, and less valuable than the third; but that is for the arbitrator to ascertain.

As regards another question that has been referred to—in addition to the value assessed for purchase money he has added 20 per cent. on the sum allowed by him for compulsory purchase. This addition of 20 per cent., so far as concerns the price of the rent issuing out of lands, appears to have been made without authority. As regards compensation for land (as distinct from rent) taken compulsorily, arbitrators in the same way as juries do frequently add something for the annoyance of being disturbed in the possession, and the difficulty and delay in procuring other suitable premises, and they are not legally bound to treat the case as exactly the same as an ordinary case of vendor and purchaser where both parties are

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M. R. willing to contract; but I cannot say that even in respect of
1902. actual occupation of lands in point of law an allowance of 20
In re per cent. additional is a reasonable allowance. I am sure it is
ATHLONE unreasonable in respect of a rentcharge. I shall remit the award
RIFLE RANGE to the umpire for reconsideration of the question of the amount
to be paid by the Secretary of State for War, being of opinion
that the compensation payable to Percy in respect of the rent
reserved to him by the lease of 1888 should be assessed on the
basis of a purchase immediately before the service of the notice to
treat, and should be valued as the rent reserved upon a lease for
the residue unexpired of a term of twenty-one years from its date,
which contained the clause of surrender in question; that the
umpire should not treat it as a question of any legally fixed
number of years' purchase, but taking into consideration all
the circumstances of the lease and the holding, should find the
reasonable value of the rent to be purchased on the basis of what
a purchaser would have given for it at the time in question apart
from compulsory powers.

Solicitor for the War Department: *Sir P. Coll.*

Solicitor for Henry Percy: *W. P. Kelly.*

Solicitors for Mrs. Fitzgerald: *Joseph Burke & Son*

Solicitor for Mrs. M'Weeny: *H. F. Martley.*

Solicitor for Morgan and Ramsay: *J. Gaynor.*

R. W. L.

IN RE JOHNSON & COMPANY, LIMITED.

(1902. No. 468.)

M. R.
1902.

June 23.

Company—Voluntary winding up—Right of bank to set off one account of Company against another.

A bank agreed with the directors of a Company, which had an overdrawn account, to close that account, and open a No. 2 account. This was done for the purpose of winding up the business of the Company, which was in difficulties, and the bank was so informed. Moneys were lodged to the No. 2 account and cheques drawn against it. The Company afterwards went into voluntary liquidation. The bank declined to allow the liquidator to draw against the No. 2 account, and claimed to set off the credit balance on that account against the debit balance of the No. 1 account:—

Held, that there was a special arrangement which prevented the bank exercising its ordinary right of setting off one account of a customer against another.

THIS was an application on behalf of Henry Fox, the liquidator of the above Company, for the determination (under the Companies Act, 1862, sect. 138) of the following question arising in the voluntary liquidation of the above Company, viz.:—Was the Northern Banking Company entitled, instead of paying to the liquidator (as required by him) the credit balance shown by account No. 2 of the Company in the books of the said bank, to set off *pro tanto* the said credit balance as against the debit balance shown by account No. 1 of the said Company in the books of the same bank.

The facts, as stated in the affidavit of Mr. Galway, solicitor for the Company, were as follows:—

The Company was incorporated on the 17th July, 1899, for the purpose of carrying on the curing and provision business. In 1901 the financial condition of the Company was in an unsatisfactory state, and Mr. Henry Fox, of Waring-street, Belfast, chartered accountant, was employed to investigate the affairs of the Company, and he reported that the share capital

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had practically disappeared. A meeting was held at Mr. Fox's office on the 16th October, 1901, at which there was present Mr. A. J. Johnson, managing director of the Company, Mr. John Kirk, a shareholder to the extent of 234 fully paid up £5 shares, who had guaranteed to the Northern Banking Company, Limited, the Company's bank account to the extent of £850, several other shareholders and creditors, and Mr. Fox and Mr. Galway. Mr. Galway told the meeting the state of the Company's financial affairs, and that the share capital had practically disappeared, and that liquidation seemed to be the only course. Mr. Galway advised the directors that a No. 2 account should be opened by them with their bankers, the Northern Banking Company, Limited, which should be available for the purpose of carrying on the business of the Company during liquidation, if it should become necessary to liquidate, so that it might be possible to dispose of it as a going concern. After the meeting in Mr. Fox's office was over, Mr. Kirk and Mr. Galway proceeded to the Royal-avenue branch of the Northern Banking Company, Limited, and spoke to the late Mr. William Roberts, who was the manager. Mr. Kirk informed him that in consequence of the unsatisfactory condition of the affairs of the Company he felt certain that liquidation must necessarily ensue, and as he could not see his way to continue his guarantee of the Company's bank account, he wished the same closed and a No. 2 account opened. Mr. Roberts then went to the telephone, and had some conversation with the directors in the head office, which Mr. Kirk and Mr. Galway did not hear. He came back in a few minutes, and informed them that a No. 2 account would be opened as requested. It was explained to Mr. Roberts that a number of large cheques had come in, in or about £200 in amount, and that these would be lodged to the credit of the said No. 2 account, which would be an unsecured account, for the purpose of carrying on the business until some definite arrangement should be arrived at either by a purchase, as Mr. Johnson had suggested, or by a sale in the winding up, if that became necessary. The bank fully understood that the said account was being opened for the purpose of winding up the business.

Mr. Johnson was unable to procure the assistance he expected, and on the 26th October a resolution was passed at an extraordinary general meeting, that the Company should be wound up voluntarily, and Mr. Fox appointed liquidator. On the 6th November Mr. Fox applied to the bank to allow him to draw against the No. 2 account, but they refused to do so, alleging that they were entitled to set off the credit balance of the No. 2 account against the debit balance of the No. 1 account. Previous to this lodgments had been made to the credit of the No. 2 account, and cheques drawn against it, signed by Mr. Johnson and Mr. Kirk, the secretary. The liquidator brought the matter before the Court under sect. 138 of the Companies Act, 1862, at the instance of creditors, who considered that the balance to the credit of the No. 2 account, which amounted to £203 7s. 7d. on the 22nd April, 1902, should be made available for the purpose of the liquidation.

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Jonathan Pim, for the liquidator :—

Where a customer has two accounts at his bankers, the ordinary right of the banker, in the absence of special contract or usage, is to set off one account against the other: *Garnett v. McKewan* (1). That was a case of a customer having an account with a credit balance at one branch of a bank and an account with a debit balance at another branch of the same bank. It was held that the bank was entitled at any time to combine the accounts and charge the account where there was a credit with the debt due on the other account, there being no special contract between the parties that each account should be kept separate. It is otherwise where there is a special contract or usage: *Hill v. Smith* (2) and *Cummins v. Shand* (3) there cited. Here there was a special contract. The bank was informed of the facts, and asked to close the old account and open a No. 2 account for the purpose of winding up the business of the Company. If there had been no such special contract, the bank could have immediately placed the £200 which was lodged to the No. 2 account against the amount due under the No. 1 account.

(1) L. R. 8 Ex. 10.

(2) 12 M. & W. 618.

(3) 5 H. & N. 95.

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Pigot, for the Northern Banking Company :—

Owing to the death of the manager of the bank the facts are meagre ; but there was no agreement to keep open the No. 2 account for any particular time, and even if there was any such agreement, there was no consideration for it. The bank could close the No. 2 account at any time.

THE MASTER OF THE ROLLS :—

My view of this case is against the contention of the bank. The Company was in difficulties, and had overdrawn its account with the bank to the extent of over £800. The overdraft of the Company was guaranteed to the extent of £850 by Mr. Kirk, who was a large shareholder. A meeting was held at the office of Mr. Fox, an accountant, where it was pointed out that the share capital of the Company had practically disappeared, and that liquidation seemed to be the only course. Mr. Galway, solicitor to the Company, attended this meeting. He advised the directors to close the old account and to open a No. 2 account with the bank which should be available for the purpose of carrying on the business of the Company during liquidation, if it should become necessary to liquidate, so that it might be possible to dispose of it as a going concern. The bank were not bound to open a new account unless they chose, but they did so, and opened what was called a No. 2 account. Had they not done so, another bank probably would. Now what is the meaning of a No. 2 account? It no doubt often means that the account refers to another subject-matter or department of business for mere convenience, but is not otherwise legally separate from the No. 1 account of the customer ; and in such cases the balance on the one account can be set off against the other. But in the present case it is more than that. The No. 1 account was to cease to be operative, and a No. 2 account was to be opened. This appears from Mr. Galway's affidavit, in which he deposes to the conversation he and Mr. Kirk had with the bank manager. He says that Kirk informed the manager that he felt certain that liquidation must necessarily ensue, and that as he could not see his way to continue his guarantee of the Company's bank account for any further amount, he wished the same closed and a No. 2 account opened,

which must have conveyed to the mind of the manager that the two accounts were to be not merely nominally but really separate.

The manager then communicated by telephone with the directors of the board, and informed those representing the Company and Kirk that a No. 2 account would be opened, as requested. It was explained to the manager that a number of large cheques had come in, in or about £200 in amount, and that these would be lodged to the credit of this No. 2 account, which would be an unsecured account for the purpose of carrying on the business until some definite arrangement should be arrived at, either by purchase, as suggested by Mr. Johnson, or by sale in the winding up if that became necessary. The bank fully understood (he adds) that the said account was being opened for the purpose of winding up the business, which, of course, could only be done by its being an active account.

Assuming the facts to be correctly stated by Mr. Galway, no one can doubt that it was intended that the No. 1 account should not be a running account after that date, and that a No. 2 account was to be opened as a separate and distinct transaction, and that cheques coming in after that date should not be applied to the No. 1 account. In these circumstances no right of set off could arise. The bank cannot rely on any lien. I must answer the question in the summons, by saying that the Northern Banking Company are not entitled to set off the credit balance on the No. 2 account against the debit balance shown on the No. 1 account. Each party must bear their own costs.

Solicitor for the liquidator: *W. B. Galway.*

Solicitors for the Northern Banking Company: *Peebles & Knox.*

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1902.
FITZGERALD, A VENDOR OF LAND.

March 24.

April 29.

June 2.

*Landlord and tenant—Land Purchase Acts—Redemption of superior interests
—Improprate tithe rentcharge—Number of years' purchase.*

In the absence of special circumstances, twenty years' purchase is reasonable and sufficient for the redemption of impropriate tithe rentcharge.

MOTION upon the ruling of the final schedule of incumbrances for an order for the redemption of certain impropriate tithe rentcharges, and the fixing of the redemption prices at twenty years' purchase of the revised tithe rentcharges. In a schedule annexed to the notice of motion particulars of the several tithes before and after their reduction under the Tithe Rentcharge (Ir.) Act, 1900, and the proposed redemption prices were given.

Jellett, K.C., for the party having carriage in West's Estate, in which the tithe rentcharges were for sale in the Land Judge's Court :—

The tithe owners are entitled to more than twenty years' purchase, as these impropriate tithe rentcharges are, at least, of equal value with the ecclesiastical tithe rentcharges now vested in the Irish Land Commission, for which twenty-two and a-half years' purchase is always demanded by the Treasury and allowed. The two classes of tithes were originally *pari passu*. Under the Tithe Rentcharge Act of 1838 they together made one tithe, issuing out of one parish; and the fact that one portion of that one tithe was paid to the vicar and the other to the lay impropiator made no difference as to the value of the tithe. They were both equally liable to variation. This continued till the Irish Church Act, 1869, Amendment Act of 1872, sect. 6 (3), provided that the ecclesiastical tithes should not be liable to variation. The next Act of Parliament dealing with tithes is the Land Law (Ireland) Act, 1887, section 15, which provides for the redemption of tithe rent-

charge. As to the lay tithe, the price is to be fixed by the Land Commission. As to that payable to the Land Commission, the consent of the Commissioners of the Treasury was requisite; but the fact that different bodies had to fix the redemption price did not make any difference in the value of the tithes. The Treasury gave a general consent to the redemption of the Land Commission tithes at twenty-two and a-half years' purchase, which was duly acted on in every case. Then came the Land Law (Ireland) Act of 1896, section 37 of which provided that where the Land Commission ordered the redemption of tithe rentcharge under sect. 15 of the Act of 1887, at a price not less than twenty years' purchase, the consent of the Treasury should not be required. Then both classes of tithes were redeemed at twenty years' purchase. At that time one was variable and the other not variable. Then came the Tithe Rentcharge (Ireland) Act of 1900, which provided for the variation of all tithes in accordance with the percentage of variation in judicial rents, and for the varied amounts being payable for fifteen years; but which also, by section 9, again made the consent of the Treasury requisite. The result is that when the ecclesiastical tithes were not variable they were redeemed at twenty years' purchase: when variable, as now, the Treasury require twenty-two and a-half years' purchase. After the Act of 1896 the question came before this Court in *Re the Earl of Portarlington, a Vendor; Jackson's Tithes* (1), where twenty years' purchase was adopted as a good working rule as to both classes of tithes, though at that time the ecclesiastical tithe rentcharge was not variable, and consequently the two classes of tithes were considered of equal value.

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The security of the tithe owner is greater since the Act of 1900, for once a judicial rent is fixed on a holding the rent is more secure. The less there is paid out of the land the easier it is to pay it; and when second-term rents are fixed the margin will be still larger. The rent becomes more valuable as it is reduced, and consequently the tithe also becomes more valuable. The effect of the Act of 1900, in substituting a variation every fifteen years for the more frequent septennial variation, has been

(1) 33 I. L. T. R. 64.

Meredith, J. to make the tithes more valuable. The tithes are superior to the head rent, which is worth twenty-five years' purchase, and so they are worth at least as many years' purchase, as the security for them is greater. Even rents reserved in grants under the Church Temporalities Acts, which are variable like tithes, are redeemed at more than twenty years' purchase.

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Take the figures in this case. The revised tithe is £24 4s. 7d., having been reduced by 26·9 per cent. under the Act of 1900. The lands contain 787 acres; the valuation is £431 3s., and the rental £476 1s. 8d.; the tithes are ahead of everything except quit rent of £1 2s. 6d. per annum. [MEREDITH, J.—Have you any affidavit as to the value?] No. It is hard to see what could be special circumstances in the case of tithe rentcharge, for all tithe rentcharge is amply secured. The income which will be derived from the investment of the proposed redemption price will be much smaller than the amount of the tithes.

Gerald Fitz Gibbon, for the vendor:—

This Court decided that when tithes were not variable they were only worth twenty years' purchase, and it cannot now be said that when they are variable they are worth more.

June 2.

MEREDITH, J. (having read the notice of motion and the schedule thereto), said:—

Being of opinion that the prices suggested are reasonable and sufficient, I make the order asked for, and fix the redemption prices at the respective amounts named in the schedule. In so doing I follow the rule which has guided the Land Commission for a considerable period, and which has also, I understand, been acted on by Mr. Justice Ross. That rule is the "working rule" referred to by me in the case of *Portarlinton, a Vendor* (1), under which the redemption price of every tithe rentcharge is fixed at twenty years' purchase in the absence of any special circumstances affecting the question of price, favourably or unfavourably. In *Lord Portarlinton's Case* (1) I went at length into the reasons for my decision, and it is not necessary for me

to repeat those reasons here; but I should like to observe that the report in the Irish Law Times omits a reference to the case of *Hanrahan's Estate* (1). A few extracts from the report of Mr. Commissioner Lynch's decision in that case will make some passages in my reported judgment clearer. At p. 8, Mr. Commissioner Lynch says:—"I now come to deal with the question of price. Mr. Shekleton has urged that the price should be 22½ years' purchase of the net tithes, being the rate named in the 32nd section of the Church Act of 1869, while Mr. Hanrahan has contended that, having regard to the rate at which he has sold to his tenants (about 16½ years upon the tenement valuation), and to the statutable right which exists for the septennial revision of tithes, according to the price of corn, &c., in the district, and to the existing prices of corn in the locality where this estate lies, the price should be fixed at eighteen years. I am of opinion that the rate named in the Church Act (22½ years' purchase) is in excess of the selling value of lay tithes in the open market. Lay tithes, when sold in the Incumbered Estates and Landed Estates Court, did not fetch such rates. The Landed Estates Court Judges, when awarding compensation for misstatements as to the liability of lands to tithe rentcharge, usually awarded eighteen years' purchase, or sometimes the same rate as that at which the estate was sold. The report of the Royal Commissioners on the Acts of 1881 and 1885 recommends a reduction in the price of tithe rentcharges as fixed by the Church Act. The 15th section of the Land Law (Ireland) Act, 1887, points to a revision of these rates, and therefore, without reference to any decision which the Commissioners may, with the consent of the Treasury, come to as to the price at which tithe rentcharge payable to the Land Commissioners may be redeemed, I am prepared, having regard to all the circumstances of the case, to fix the redemption price of this lay tithe rentcharge at twenty years' purchase upon the tithes, after deducting the poor rate taken on the average of the last five years."

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ESTATE.

These extracts are not unworthy of consideration in the present case. Again, in the case of *The Marquis of Bath*, a

(1) *M'Carthy's Land Cases*, 5.

Meredith, J. Vendor (1) (reversed on a different point), Mr. Commissioner 1902. Lynch, in dealing with the question of redemption price, said :—
In re “As to the price, as Mrs. Keenan’s counsel does not desire to give
 FITZ- further evidence on this point, I am prepared to adopt the scale
 GERALD’S which we have usually applied to impropriate tithes, viz. twenty
 ESTATE. years’ purchase of the tithes, less the average deductions for poor rates, and fix the redemption price at that scale.”

My decision in *Portarlington’s Estate* (2) was acted upon until the Tithe Rentcharge (Ireland) Act, 1900, became law. However, shortly after the passing of that Act, the point was raised that tithe rentcharges, reduced in amount under the provisions of section 3, must be of relatively greater saleable value than the old unreduced charges, and I was pressed to adopt a higher scale of redemption price. In *Clements’ Estate* (3) the question was fully argued before me, and counsel for the owners of valuable tithe rentcharges urged that the Act of 1900, while on the one hand reducing the amount of the charge, had, on the other hand, enhanced the saleable value of the residue—on the ground that the smaller the charge on a given estate the better the security. In delivering judgment I pointed out that the argument in question had no real weight in a case where there never was and never could be any question of deficiency as regards the security. In *Clements’ Estate* (3) the unreduced rentcharge was amply, indeed overwhelmingly, secured; and I held that the mere reduction of the rentcharge did not, from a practical point of view, make the security for the reduced charge better to any appreciable extent. I arrived at that opinion on the facts and figures of the case. On the facts and figures of the present case I entertain a similar opinion.

Apart then from the reduction in the amount of the charge, what has the Act of 1900 accomplished to justify a revision of the scale applicable to normal cases of redemption? Mr. Jellett argues that sub-section 2 of section 3 is more favourable to the owners of tithe rentcharge than was the former law relative to variation. No doubt variation can only occur at intervals of fifteen years, but the complicated methods of former times have

been replaced by an automatic process which entails no expenditure, and involves no risk of defeat. Then, again, the 7th section of the Act has effected a change in the law as it stood when the case of *Portarlington's Estate* (1) was under consideration, but that change is distinctly unfavourable to the tithe rentcharge owner.

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On the whole, speaking as a juror, I fail to see how the position of the owner of lay tithe rentcharges has been improved by the Act of 1900.

In *Clements' Estate* (2) (as in the present case) I was pressed with the anomalous position which at present exists as regards the redemption price of ecclesiastical (now Land Commission) tithe rentcharges on the one hand, and lay tithe rentcharges on the other. I pointed out in *Clements' Estate* (2), and I now desire to emphasize the fact, that the Land Commission have no voice in the matter of the price at which reduced tithe rentcharges payable to the Land Commission are redeemed.

Section 9 of the Act of 1900 restores the full and absolute control of the Treasury over redemption and redemption prices, in cases coming within the operation of section 3. The Treasury can grant or withhold consent to redemption; can make their own terms; and fix their own prices; and in the absence of a general authority it would be necessary to make a separate application for consent to redemption in each individual case. To avoid the delay and expense of separate applications, the Treasury have given the Land Commission a general consent authorizing redemption at 22½ years' purchase in the case of all rentcharges coming within the operation of section 3 of the Act of 1900. I have no jurisdiction to discuss or question the decision of the Treasury. I am bound by it in the cases to which it is applicable; but I am not bound in other cases to surrender my own judgment or disregard my own view of what is just and equitable; and, after careful consideration, I adhere to my opinion, that under normal circumstances the rate of twenty years' purchase is reasonable and sufficient. It must, of course, be borne in mind that the redemption price in Treasury cases may be discharged by the transfer of

(1) 33 L. L. T. R. 64.

(2) Unreported.

Meredith, J. Guaranteed Land Stock "to the nominal amount payable in respect of such redemption," instead of by a payment in cash. (See Purchase of Land (Ireland) Act, 1891, section 17.) When Guaranteed Land Stock is below par, vendors very properly take advantage of this provision; and, if a similar provision applied in the case of lay tithe rentcharges, there might be some justification for altering the scale. But the owners of lay rentcharges must be paid in cash.

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It only remains to add that in the present case no evidence was given on either side of any "special circumstances." Mr. Jellett says that he finds it difficult to determine what might or might not be considered a special circumstance. I can only say that I was willing in this, as in every similar case, to hear any evidence the parties on either side desired to adduce; and, for example, if it had been proved in this case that lay tithe rentcharges, similarly situated, had since the Act of 1900 been sold in the market at a higher rate than twenty years' purchase, I should certainly have regarded such sale (if *bona fide*) as a special circumstance to be weighed and considered.

Solicitors for the vendor: *A. O'Connor & Son.*

Solicitors having carriage in West's estate: *St. George & Browne.*

W. C. S.

IN THE MATTER OF JAMES REA, DECEASED ;
 REA v. REA.
 (1901. No. 765.)

M. R.
 1902.
 Feb. 13, 14,
 28.

Intestates Estates Act, 1890 (53 & 54 Vict. c. 29)—Widow's charge—Dower—Lex domicilii—Lex loci as applied to proceeds of sale of Victorian lands—Victorian Intestates Estates Act, 1896 (No. 1419)—Order of application of assets in payment of debts.

A domiciled Irishman died in Ireland, intestate without issue, leaving a widow surviving. His property in Ireland consisted of freeholds, chattels real, furniture, stock, and cash. He was also possessed of lands in the colony of Victoria, granted to him in fee by the Crown, which lands by the law of the colony were regarded and devolved as personal estate. The only creditors were in Ireland. Administration was taken out in Ireland by the widow, and in Victoria by a person appointed for the purpose, who sold the lands, and remitted the net proceeds to the widow.

By the Victorian Intestates Estates Act, 1896, a widow is entitled, on the death of her husband intestate and without issue, if his estate is over the value of £1000, to a charge of £1000 upon it, and the residue is divisible between the widow and the next-of-kin.

The widow brought an action against the heir-at-law and one of the next-of-kin of the deceased, and claimed (1) £1000 out of the proceeds of sale of the Victorian lands, as well as £500 out of the real and personal estate in Ireland, (2) dower out of the Irish freeholds, and (1) a moiety of the residue of the proceeds of sale of the Victorian lands, and of the Irish personal estate, after payment thereof of the debts of the intestate:—

Held, (1) that the plaintiff was entitled, under the Victorian Act, to £1000 out of the proceeds of sale of the Victorian lands; (2) that the balance was to be taken as personal estate, and added to the Irish personalty, and that the debts were to be paid out of this blended fund; (3) that the widow was entitled to £500 out of the remainder of this blended fund, and out of the Irish real estate, to be apportioned as directed by the Intestates Estates Act, 1890; (4) that of the residue of the personalty the widow was entitled to one moiety, and the next-of-kin to the other moiety; (5) that the widow was entitled to dower out of the residue of the realty, which, subject thereto, went to the heir-at-law.

TRIAL OF ACTION.

The facts of the case were stated in the statement of claim as

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follows :—The plaintiff was the widow and administratrix of James Rea, deceased, of Ballymacreeely, Killinchy, in the county of Down, farmer, who died in the said county on February 4th, 1900, intestate, leaving the plaintiff his widow, but no issue him surviving. James Rea was domiciled in Ireland, and at the time of his death was possessed of considerable real and personal estate, which consisted mainly of the following, that is to say, freehold lands in the colony of Victoria, Australia; freehold lands in the county Down, and certain personal estate in Ireland, consisting of furniture, stock, and cash, and also Irish lands of chattel real tenure. The plaintiff was married to the deceased in 1886. The defendant Martin Rea the younger was the heir-at-law of the deceased, being the eldest son of the deceased's eldest brother John, who predeceased James Rea. The defendant, Martin Rea the elder, was one of the next-of-kin of James Rea, being one of his four brothers, but the only one of them alive, and he was named as defendant in order to represent the interests of the next-of-kin of James Rea. By virtue of the Intestates Estates Act, 1890 (52 & 53 Vict. c. 29), the plaintiff claimed to be entitled to a charge of £500 on both the net value of the Irish real and the net value of all the personal estate of the deceased.

The Australian property of the deceased consisted of lands granted in fee to him by Victorian Crown grants made previous to the year 1860, and was in his possession at the time of his death. By the provisions of the Probate Act of Victoria, 1890 (No. 1060), the said real estate vested in the plaintiff as personal representative of her husband, and became divisible, according to the analogy of the English Statute of Distributions, among the widow and next-of-kin. On December 18, 1900, this Australian real estate was sold in Australia by one W. H. Allerd, the administrator of the said Australian property, under power of attorney from the plaintiff, the administratrix of the deceased in Ireland, and all debts, duties, and other liabilities affecting the same in Australia were discharged by the said W. H. Allerd. (The account furnished by the Australian administrator was produced at the trial, and it appeared from it that there were no debts of the deceased in Australia, the only deductions being the costs of administration in Australia.) The net proceeds of the sale of the

Australian realty, amounting to £2761 8s. 1*d.*, were forwarded from Australia by the said Australian administrator to the plaintiff, deceased's personal representative, and were in Ireland. The deceased was not possessed of any movable property in Australia.

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By the Intestates Estates Act, 1896, of the colony of Victoria (No. 1419), sects. 1-4, it is provided that where a man dies intestate after March 1st, 1896, leaving a widow, but no children, if the real value of his estate exceed £1000, his widow is entitled to a charge for £1000 on all real estate, together with interest on £1000 at 4 per cent. per annum from the death of the intestate till payment, such £1000 to be in addition and without prejudice to the widow's share in the residue, as if such residue had been the whole of the estate. The Victorian Act of 1896 is taken from the Intestates Estates Act, 1890 (U. K.), substituting £1000 for £500, and charging it on the estate of the intestate, omitting the words "personal" and "real," and the provisions applicable thereto, the distinction between personal and real estate no longer existing in Victoria. The material provisions of the Intestates Estates Act, 1890 (U. K.), are stated in the judgment. The real estate of the deceased in Ireland consisted of two farms of land in the county of Down, containing about 28 acres and 14 acres respectively, the two farms being of the value of about £740; and the plaintiff claimed to be entitled to dower in respect of the same. The personal estate of the deceased in Ireland was estimated at about £298 18s. 5*d.*, and his debts amounted to about £973 5s. 8*d.*

In these circumstances the plaintiff claimed—(1) a declaration that the plaintiff, as widow of James Rea, was entitled to a charge of £1000 upon the net proceeds of sale of the freehold estates of the deceased in the colony of Victoria, in addition to the charge of £500, under the Intestates Act, 1890, upon the said real and personal estate of the deceased in Ireland; (2) that such charges, with interest thereon, were payable to the plaintiff in priority to the claims of the deceased's next-of-kin and heir-at-law; (3) that the plaintiff was entitled to dower out of the deceased's real estate in Ireland; (4) that all Victorian debts and liabilities having been already paid, deceased's remaining liabilities were payable out

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of both his personal estate, situate in Ireland at the time of his death, and out of the proceeds of the sale of the deceased's Victorian realty, but primarily out of the deceased's Irish personalty; and (5) in the alternative the plaintiff claimed an order for the administration of the real and personal estate of the deceased.

The defences put in did not dispute the facts above stated, but only raised points of law.

Martin Rea the younger, the heir-at-law, by his defence raised the following points :—

He denied that the plaintiff was entitled to the charge of £1000 on the Victorian assets. In any event he contended that the plaintiff was not entitled to both the charge of £1000 and also the charge of £500 under the Intestates Act, 1890. He submitted that the personal estate of the deceased situate in Ireland at the time of his death, and the net proceeds of the sale of the freehold estates in Victoria now in the hands of the administratrix, together make up the personal assets of the deceased, and should be distributed according to the law of the country ; that is to say, the law of Ireland, in which the estate was being administered. That the plaintiff's charge of £500, under the Intestates Act of 1890, should be borne by and paid in proportion to the value of the deceased's Irish freehold property and the net assets of the personal estate as above defined.

The defendant Martin Rea the elder, representing the next-of-kin, by his defence submitted that the personal estate of the deceased at the time of his death should be first applied in payment of the debts due by him, and that so far as the same was insufficient therefor, the said debts should be paid rateably out of the real estate of the deceased situate in Ireland and of the immovable property of which he died seised situate in the colony of Victoria ; while admitting that the proceeds of the sale of the said immovable property were assets for the payment of the deceased's debts, he submitted that the same was not at the time of his death and is not now personal estate of the deceased, so as to be subject to the law of the deceased's domicile, and that, accordingly, neither the 7 Wm. 3, c. 6 (Irish Statute of Distributions), nor the Intestates Act, 1890 (53 & 54 Viet. c. 29), was applicable thereto ; that the balance of the proceeds of the sale of the said

immovable property (after payment thereof of such proportionate part of the said debts as the same may be properly liable to bear) belonged beneficially to the persons entitled thereto under the law of the said colony, and that under the said law he was entitled to a distributive share thereof as one of the next-of-kin of the deceased.

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The plaintiff, by way of reply to the defence of Martin Rea the younger, denied that the proceeds of the sale of the Victorian freehold lands constituted any part of the personal assets of the deceased, or that they are liable to be distributed by the law of Ireland; but submitted that they were to be deemed immovable as subject to the law of Victoria, and to be distributed in this country by adopting and enforcing in regard to them the law of Victoria. By way of reply to the defence of Martin Rea the elder, the plaintiff admitted that the balance of £664 4s. 3d., or thereabouts, remaining of deceased's debts, after applying the Irish personalty in discharge of them, *pro tanto*, was payable rateably out of the proceeds of the Victorian real estate now in hands, and of the Irish realty when sold for the purpose; the plaintiff also admitted that the proceeds of the Victorian real estate is not personal estate subject to the law of Ireland.

In 1901 proceedings were taken by originating summons to determine the above questions, and affidavits filed in support of it, but on the hearing of the summons the Master of the Rolls was of opinion that the questions could not properly be determined on originating summons. This action was therefore brought, and a consent was entered into that the evidence at the trial should be taken by affidavit, and that the plaintiff or either of the defendants should be at liberty to read and use as evidence the affidavits of the plaintiff, filed June 8th and 25th, 1901, and the affidavits of Hanbury C. Geoghegan and J. C. White, filed June 21st, 1901. The only affidavit necessary to refer to is that of the said Hanbury C. Geoghegan, a solicitor in Dublin, who had practised for several years in the colony of Victoria as a barrister and solicitor. He stated that according to the law of Victoria real estate is treated as personalty, and is divided in accordance with the English Statute of Distributions in the absence of a will or a duly exercised power of appointment. That all rights of dower

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were put an end to by the Real Property Act of Victoria, 1890 (No. 1136), section 57, except such claims as had been lodged with and allowed by the Registrar-General of Victoria within two years from December 28th, 1880 ; that assuming the real property in question consisted of the lands described in the copies of four Victorian Crown grants made in 1853, 1855, 1856 and 1857, submitted to him, and that James Rea, the Crown grantee therein named, died intestate in the year 1900, the devolution and distribution of the said lands was determined by and distributable in accordance with the Administration and Probate Act of Victoria, 1890 (No. 106), sect. 8 (5). By the Intestates Estates Act, 1896, of Victoria (No. 1419), sect. 164, where a man dies intestate after March 1st, 1896, leaving a widow, but no children, if the net value of his estate does not exceed £1000, his widow takes it all ; but if the net value thereof exceeds £1000, his widow takes £1000 thereof, and has a charge therefor upon all such estate together with interest on the said £1000 at 4 per cent. per annum from the death of the intestate till payment, such £1000 and interest, being in addition and without prejudice to the widow's right to share in the residue, as if such residue had been the whole of the estate of the intestate.

Samuels, K.C., and W. H. Brown, for the plaintiff :—

The plaintiff claims a charge of £1000 upon the proceeds of the sale of the Victorian property, in addition to a charge of £500 (under the Intestates Estates Act, 1890), on the property in this country. By the Victorian statute, 54 Vict. (No. 1060), real estate vests in the executor, and is to be applied as if it was personal estate. There is no dower out of the Victorian lands. The Victorian Intestates Estates Act, 1896 (No. 1419), is a copy of the Intestates Estates Act of 1890, omitting the distinction between real and personal estate. Under it the plaintiff claims £1000 as a first charge on the Victorian property after payment of debts, and half of the residue of that property as well. The Victorian property was immovable, and retains that character still, as if it had not been sold, and is to be administered by the Court as if it was administering the property in Victoria. Immovable property is governed by the *lex situs* : Westlake,

Private International Law, sections 102, 103, 141, and 148; Dicey's Conflict of Law, p. 917; (1 Jarman on Wills p. 4); *Forbes v. Adams* (1); *Murray v. Champernowne* (2); *Pepin v. Bruyere* (3). Produce of foreign lands is to be treated as if still lands in a foreign country: *Hanson v. Walker* (4); *Cook v. Gregson* (5); *Carron Iron Company v. Maclaren* (6); *Harrison v. Harrison* (7). It is contended on behalf of the heir-at-law that plaintiff is only entitled to £500 under the Intestates Estates Act of 1890, and that these Victorian lands are to be treated as assets in this country. But the net value of the real and personal estate referred to in that statute out of which the £500 is payable means the net value of property subject to the jurisdiction of the Court in this country in administration. The distinction between real and personal estate is not known to foreign law, there is no such thing as fee-simple in a foreign country, the distinction is between immovable or movable. So under the Victorian Act of 1896 the Victorian Court deals with the property over which it has jurisdiction. There is no preamble to either Act. There are two reported cases in Ireland on the effect of the Act of 1890: *M'Ferran v. M'Ferran* (8) and *Hogan v. Hogan* (9), but they do not bear on the point here.

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The plaintiff is entitled to dower out of the lands in Ireland which are held in fee-farm and are dowerable lands: *Robins v. M'Donnell* (10). If the lands are sold the value of the dower can be capitalized and paid to the widow: *Gleeson v. Byrne* (11). The claim for dower comes in before the debts: *Spyer v. Hyatt* (12); but is subject to abatement in respect of the charge of £500 imposed by the Intestates Estates Act, 1890.

Serjeant Dodd (*Strong* with him), for the defendant *Martin Rea* the younger:—

The authorities cited do not affect this case; the proceeds of foreign land sold after the death of the intestate and brought over

(1) 9 Sim. 462.

(2) [1901] 2 Ir. R. 232.

(3) [1902] 1 Ch. 24.

(4) 7 L. J. Ch. (O.S.) 135.

(5) 2 Dr. 286.

(6) 5 H. L. Cas. 416

(7) L. R. 8 Ch. App. 342.

(8) [1897] 1 I. R. 66.

(9) [1901] 1 I. R. 168.

(10) 3 L. R. Ir. 391.

(11) 25 L. R. Ir. 361.

(12) 20 Beav. 621.

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1902. — £500 : *Beaumont v. Oliviera* (1). If the estate of the intestate
REA was being administered in Victoria, and there were Irish debts, they
v. would have to be satisfied before the widow could get £1000.
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Fleming, K.C. (*Maxwell* with him), for the defendant *Martin Rea* the elder:—

Beaumont v. Oliviera (1) was a peculiar case. The decree of *Stuart, V.-C.*, was varied on appeal by the Lord Justices; see the form of decree there (2). The opinion of the Vice-Chancellor that the proceeds of sale of the *Madeira* property were as much pure personalty as the other personalty was not adopted by the Lords Justices. It would be contrary to the principles of private international law if that opinion was to be regarded as a decision. Under the Victorian Act of 1896 the right of the widow attached on the death of her husband intestate and without issue. The residue of the estate of the intestate in Victoria, after payment of the debts there, if any, and of the £1000, goes to the widow or next-of-kin of the intestate according to the law of that country. If the moneys remitted from Victoria had represented moneys in Australian banks, and not lands, they would have been *mobilia*, which would follow the person, and the widow would only get £500, the amount prescribed by the law of the domicile of the intestate, viz. the Intestates Estates Act, 1890. But, as it is, she is entitled to the £1000 out of the Victorian property. The £500 to which a widow is entitled under the Act of 1890 is only payable out of the Irish assets after the Irish debts are satisfied. But the Irish assets consist of personal assets £298, realty valued at £780, total, £1078; the debts are £973, which deducted from £1078, leave only a balance of £105, insufficient to pay the £500. It may be said that an Irish creditor could resort to Australian assets, but that does not arise here. *Martin Rea* the elder claims a share of the Victorian property as a *persona designata* under the Victorian Act.

Strong, for *Martin Rea* the younger:—

As to the nature of the Victorian property. Negroes were

(1) L. R. 6 Eq. 534; L. R. 4 Ch. App. 309. (2) L. R. 4 Ch. App. 309.

made movables for payment of debts in Antigua: *Ex parte Rucker* (1). New River shares in England are held to be realty; so here the Victorian property is to be treated as movables, and liable to debts of the intestate whenever contracted. It is the duty of the administrator, principal or ancillary, to apply the assets reduced into possession under his grant in payment of the debts of the deceased, whether owing to creditors within the jurisdiction from which the grant issued, or out of it: *In re Klæbe* (2). The Irish creditors have a claim on the assets sent over here, just as they would have had if the property had remained in Victoria and they had applied for payment there. *Cook v. Gregson* (3) has no bearing on the case. The Victorian Act of 1890 says that the lands are to be treated as if personal estate. There is no difficulty in so treating them, as the proceeds are here, and were remitted as personal estate. The Victorian Act of 1896 uses the word "estate," and not real or personal estate.

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If the Victorian property is to be regarded as immovable, peculiar consequences would follow. Suppose the deceased had left movable as well as immovable property in Victoria, and the administrator there had applied both in payment of debts in Victoria, and had remitted the balance, how would such remittance be applied in payment of debts here?

Maxwell, for Martin Rea the elder:—

The distinction to be observed is between *mobilia* and *immobilia*, and the proceeds of the sale of the Victorian lands must be applied according to the *lex situs*. In *De Fogassieras v. Duport* (4), Warren, J., decided that chattels real in Ireland were clearly *immobilia*, and passed under a will which was valid by the law of Ireland, but invalid by the law of France, where the testator was domiciled. So in *In re Piercy* (5) land in Sardinia, owned by an English testator, was held to be governed as regards its disposition by Italian law. The right of a creditor of the deceased to resort to Irish or Victorian property is not raised here, and the rights of the beneficiaries are to be corrected, if necessary, by marshalling.

(1) 3 D. & C. 714.

(4) 11 L. R. Ir. 123.

(2) 28 Ch. D. 175.

(5) [1895] 1 Ch. 83.

(3) 2 Drew. 296.

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The land in Victoria must be treated as if it had not been sold, and is governed by Victorian law ; therefore the widow is entitled to get £1000 out of it under the Victorian Act of 1896 ; but it cannot be thrown into hotchpot with the Irish property : *Blackwood v. The Queen* (1). Under the same Act the next-of-kin of the deceased are entitled to their share of the residue. The widow is entitled under the Intestates Estates Act of 1890 to £500 out of the net Irish property, after payment of such debts as are properly payable thereout. If, as it appears, the Irish personalty is insufficient to pay the Irish debts, the Victorian property is on the same plane as the Irish real estate as to liability to debts, that is to say the deficiency should be borne rateably.

W. H. Brown, in reply :—

The Victorian property is equally liable with the Irish property to pay debts : *In re Klæbe* (2) ; *Story v. Fry* (3). All the creditors are in this country. The arguments put forward on behalf of the next-of-kin and heir-at-law answer each other. The debts should be borne rateably by the Irish personalty and the proceeds of the Victorian property.

Feb. 28.

THE MASTER OF THE ROLLS :—

The facts are admitted, and the questions for determination, though in some respects quite new, depend upon a few general and undisputed propositions of law, and two short sections, one of a British and one of a Victorian statute. The figures and sums mentioned in the statement of claim may not be critically exact. That could not be determined without an inquiry. But the parties desire to take them as sufficiently accurate, and to raise for determination the matters now in controversy. "The rule is that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatever to the place either of his birth or the death, or the

(1) 8 A. C. 82.

(2) 28 Ch. D. 175.

(3) 1 Y. & C. C. C. 603.

situation of the property at that time": Williams on Executors, 1387. Personal estate in this passage must be understood as "movable," since the classification of property as personal and real estate is peculiar to our law, while the far more simple and scientific distinction between movable and immovable property is that which is recognized in the jurisprudence of most other countries.

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In the case of immovable property of whatever tenure the *lex loci rei sitae* applies, instead of the *lex domicilii*, the reason being that immovable property, that is land or things appurtenant to land, forms part of the actual territory controlled by the law at the place, and by international comity and for manifest convenience is deemed to be, for purposes of descent and inheritance, regulated by the *lex loci*. This is well expressed by Lord Selborne in *Freke v. Lord Carbery* (1). He says, at p. 466: "The territory and soil of England, by the law of nature and of nations, which is recognized also as part of the law of England, is governed by all statutes which are in force in England. This leasehold property in Belgrave-square is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so." He goes on: "Domicil is allowed in this country to have the same influence as in other countries in determining the succession of movable estate, but the maxim of the law of the civilised world is *mobilia sequuntur personam*, and is founded on the nature of things. When '*mobilia*' are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immovable and not movable. The doctrine is inapplicable to it," and he continues: "I think, therefore, that the doctrine, which appears to me to be clearly the true doctrine, is recognized by necessary implication in those passages to which reference has been made, and *Story* says, with regard to some things, such as fixtures, which may or may not be movable or immovable, which are ambiguous in their nature, if they are at

(1) L. R. 16 Eq. 461.

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all connected with immovable property, then it belongs to the law of the country in which that property is situate, to determine whether they shall be deemed movable or immovable." The question there was, whether leasehold property in London was subject to the *lex domicilii*, or immovable and subject to the *lex situs*. This statement of the law applies here, where the land in question was held in fee.

On the question what the law of Victoria was on the subject, evidence was given on affidavit by Mr. Hanbury Geoghegan, solicitor, who had considerable experience in Victoria as a barrister and solicitor. Real estate (he says) is divided in accordance with the English Statute of Distributions, in the absence of a will and a duly exercised power of appointment. Assuming that the real property in question consisted of the lands described in copies of four Victorian Crown grants made in the years 1853, 1855, 1856, and 1857, which copies he had read, and that the late James Rea, the Crown grantee named in the said copies, died intestate in the year 1900, the devolution and distribution of the said lands is determined by, and must be distributed in accordance with, the Administration and Probate Act, 1890 (No. 1060), section 8, sub-section 5 (which provides that such real estate shall be held and applied by the administrator as if it were personalty). By the "Intestates Estates Act, 1896," of the Colony of Victoria (No. 1419), sections 1-4, where a man dies intestate after the 1st day of March, 1896, leaving a widow, but no children, if the net value of his estate does not exceed £1000, his widow takes it all, but if the net value thereof exceeds £1000, his widow takes £1000 thereof, and has a charge therefor upon all such estate, together with interest on the said £1000 at 4 per cent. per annum, from the said intestate's death until payment. Such £1000 and interest to be in addition and without prejudice to the widow's right to share in the residue, as if such residue had been the whole of the intestate's estate.

But while this is so, I think it follows from the decision in *Beaumont v. Oliveira* (1), relied on by Serjeant Dodd, that the proceeds of sale of land abroad must be considered in an English

administration as answering to the description of pure personalty contained in a will. Stuart, V.C., there says, at p. 539 :—"On the next question, that as to the real estate in Madeira, I entertain no doubt whatever that where a testator dies entitled to real estate in a foreign country, that estate is not within the peculiarity of the law of England, which favours heirs and devisees as against creditors, and therefore I think the proceeds of the estate in Madeira must go primarily to pay these charitable legacies." The question there arose on a will, by which a testator directed certain charitable legacies to be paid out of his pure personal estate, and devised and bequeathed the residue of his real and personal estates to his executors for their own use and benefit. The only real estate was a small one in Madeira, which was sold under the direction of the Court in the suit, which was one for administration, and the pure personalty was insufficient. He goes on :—"It may, however, be said that these proceeds are not pure personalty, and that the utmost the charities can ask for is, that they shall take their proportion with the other legatees; but my opinion is, that these proceeds are as much pure personalty as the other pure personalty, and the lands in a foreign country cannot be considered impure personal estate, nor to partake of the nature of the real estate as leaseholds do in this country. This property in Madeira must be considered as assets, and dealt with as the pure personalty, which is primarily applicable under this will to the payment of the charity legacies."

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The necessary result of these unquestioned principles is that the land in Australia must in the present case descend in the mode prescribed by the law of that colony, and that when in fact sold the net proceeds in our Courts must be treated as pure personalty.

Now, what is the mode in which the land must be dealt with under the *lex situs*? for it was land at the time of the intestate's death. It goes to the administrator under the Act of 1890 to be held and applied as if it were personalty, but it descends charged with £1000 in favour of the widow by virtue of the Intestates Estates Act of 1896. That is to say, the widow gets £1000 clear, and the balance goes to the administrator as assets.

If it be conceded that lands must in their descent be regulated

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by the *lex loci*, it follows that the land in this case stood charged by the statute of 1896 with £1000 for the widow. It follows further from *Beaumont v. Oliveira* (1) that the surplus proceeds belong to the administrator as pure personalty, and are to be disposed of by him under the *lex domicilii* as such, that is, as personal estate, in due course of administration. This, however, involves that the plaintiff by virtue of her statutory charge must receive £1000 before the Irish administrator can apply any of the foreign fund at all. It seems to me, therefore, perfectly clear that the plaintiff must have this £1000 and interest at all events.

The balance of the £2761 8s. 1d., that is £1761 8s. 1d., less interest on the £1000, then comes to the administrator in this country, and under the Statute of Victoria is assets to be applied in course of administration, the same course as that which prevails in this country.

But the Intestates Estates Act of 1890 in this country gives the widow a right to £500 before the ultimate distribution of the fund. Section 2 of that Act (52 & 53 Vict. c. 29) provides that where the net value of the real and personal estates (of a man dying intestate after the 1st September, 1890, leaving a widow but no issue) shall exceed the sum of £500, the widow of such intestate shall be entitled to £500 part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such £500, with interest from the date of the death of the intestate at 4 per cent. per annum till payment. Section 3 provides that as between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively. Section 4 provides that this provision for the widow is to be in addition to and without prejudice to her interest and share in the residue of the real and personal estates remaining after payment of £500 in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not passed. Sections 5 and 6 provide how the net value of the real and personal estates are to

(1) L. R. 6 Eq. 534; L. R. 4 Ch. App. 309.

be ascertained. The net value of the personal estate is to be ascertained by deducting from the gross value all debts, funeral and testamentary expenses, and all other lawful liabilities and charges to which the said personal estate shall be subject. This also makes the widow's £500 a charge upon the net value of the real and personal estate.

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The question then arises, is the plaintiff entitled to both these sums of £1000 and £500, or only to one, and if one, to which? I can find no reason to say that either must be surrendered. The £500 under the Act of 1890 is, of course, absolutely secure if there are assets. Then why should the £1000 under the Colonial Act, charged upon colonial assets, be lost? Or why, if the £1000 is legally provided, should it be held to include the £500 under our Act? The latter is a provision out of net assets; but there are no net assets till the £1000 charge is first paid. It would, of course, be a different question if the Australian assets had been movable, and, therefore, subject to the law of the country of the domicile. In that case the colonial statute would be of no avail against our law. But that is not so.

If £1000 had been secured to the wife by settlement, or in any other manner (the settlement not being in bar of her rights under the Statute of Distributions) she would have had both. It seems to me even clearer that she must have both, when both are secured as charges by independent Acts of different Legislatures, each having full jurisdiction over the respective subject matters.

There were no debts in Australia, and the money remitted was the entire proceeds of the Australian properties after payment of government duties, expenses of realization, etc. The net balance is to be added to the pure personalty in this country, and applied as such in paying debts before the real estate is resorted to. If there be enough (as appears clearly the case) to pay debts, funeral and testamentary expenses, etc., the residue will be divisible, half to the widow and half to the next-of-kin. The realty is, subject to dower, the property of the heir-at-law; and as the Australian freehold land cannot be liable to dower in this country, and as the freeholds within the jurisdiction are, the rights are as follows:—

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1. The widow is entitled to £1000 and interest out of the £2761 from abroad.

2. The balance, £1761, less such interest, is to be taken as personal estate, and added to the personalty realized here.

3. Debts, etc., are all to be paid out of this blended fund of personal estate.

4. Out of the remainder of this blended personal fund and the real estate in the Co. Down the widow receives £500 more, with interest, to be apportioned upon realty and personalty as directed by section 3 of the Intestates Estates Act, 1890.

5. Out of what is left of the personalty the widow receives one-half, the other half belonging to the next-of-kin.

6. The widow is entitled to dower out of the residue of the realty, which, subject thereto, goes to the heir-at-law.

Solicitor for the plaintiff: *J. C. White.*

Solicitors for the defendant Martin Rea, jun.: *Moorhead & Wood.*

Solicitors for the defendant Martin Rea, sen.: *Bennett Thompson & Mac Laughlin.*

W. L.

L'ESTRANGE *v* L'ESTRANGE (1).*Appeal.*
1902.*Will—Joint tenancy and tenancy in common—Gift of residue without words of severance—Power of advancement.* July 8.

A power of advancement given to trustees of a will, to whom the residue of the property was devised by a testator for the benefit of his children, is inconsistent with a joint tenancy, and shows the children to be tenants in common.

A testator devised the residue of his property to trustees for the benefit of six of his children, with power to his said trustees to advance such sum or sums as they might think fit, for the education and advancement in life of his said children:—

Held (affirming the decision of Chatterton, V.-C.), that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that the children were tenants in common of the residue.

By his will, dated the 26th March, 1879, Thomas L'Estrange, after certain bequests, disposed of the residue as follows:—"As to the rest, residue, and remainder of my property, real, freehold, and chattel, I devise and bequeath the same in trust to my beloved wife, Anne L'Estrange, and my brother-in-law, Timothy Mitchell, of Binville, in the county of Galway, for the benefit of the rest of my children, namely, Annie, Bridget, Margaret, Sarah, Patrick, and Mary, with power to my said trustees to advance such sum or sums of money as they may think fit for the education and advancement in life of my said daughters and my son Patrick."

Thomas L'Estrange died on the 26th March, 1879, leaving the following children him surviving, viz. Annie L'Estrange, Daniel L'Estrange, Bridget L'Estrange, Thomas L'Estrange, Margaret L'Estrange, Sarah L'Estrange, Patrick L'Estrange, and Mary L'Estrange. Annie L'Estrange and Sarah L'Estrange died before the present proceedings were instituted, intestate and unmarried. Bridget L'Estrange was married in 1886 to J. S. Valley.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

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The plaintiffs Mary L'Estrange and Margaret L'Estrange claimed that under the residuary gift the six residuary legatees took as joint tenants, so that the survivors of the six took the whole residue. Daniel L'Estrange was the heir-at-law, and the surviving brothers and sisters were the only next-of-kin, of the two sisters who had died—Annie and Sarah.

On the 5th June, 1902, Chatterton, V.-C., decided that they took as tenants in common (1), and from that order the plaintiffs appealed.

Molony, K.C., and R. C. K. Wilson, for the appellants.

O'Connor, K.C., and A. Meredith, for the respondents, were not called upon.

LORD ASHBOURNE, C. :—

Notwithstanding the very clear and able arguments of Mr. Molony and Mr. Wilson, we are all of opinion that the decision appealed from is correct. It is a case turning on the construction of a will, and, like all cases of that class, its decision depends upon the intention of the testator, to be gathered from all the language he has used.

There is no doubt that at the commencement of this residuary bequest the testator used words which would, standing alone, make the children joint tenants, but then they are followed by this clause—"With power to my said trustees to advance such sum or sums of money as they may think fit for the education and advancement in life of my said daughters and my son Patrick." The question is—Does the use of these words indicate an intention on the part of the testator to cut down the joint tenancy to a tenancy in common? It is one of those clauses of which, when read for the first time, one may not see the full effect, or ascertain how far the words will go; but when read more closely it is clear that the words confer a power, not of maintenance, but of advancement. If a sum, perhaps of a considerable amount, were advanced for one child, it would be right to debit that sum against his or her share, and that debit could not be worked out if these children

(1) See the case reported *ante*, p. 372.

were joint tenants, and could not be done unless they were tenants in common.

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We find abundant authority to support this view. In *Taggart v. Taggart* (1) Lord Redesdale said:—"Joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement, as the joint tenancy cannot be severed." These words express this view of the question in a clear and pointed manner, and that decision was referred to in *Mayn v. Mayn* (2). In the course of the argument counsel said:—"Amongst powers usually inserted in marriage settlements is certainly a power of advancement which, according to Lord Redesdale's judgment in *Taggart v. Taggart* (1), is in itself a presumption against a joint tenancy having been intended." In giving judgment Lord Hatherley approved of the decision in *Taggart v. Taggart* (1). He read the passage from Lord Redesdale's judgment to which I have referred, and he adopted the principle of that decision.

*L'ESTRANGE
v.
L'ESTRANGE.*
*Lord
Ashbourne, C.*

In the present case the testator has used words which show that the governing idea in his mind could only be satisfied by holding that these legatees took the property as tenants in common.

In my opinion the decision of the Vice-Chancellor is right, and should be affirmed, and the appeal dismissed, with costs.

FITZ GIBBON, L. J. :—

The incompatibility of a discretionary power of advancement with a joint tenancy is absolute, because the exercise of such a power implies the reduction of several parts of the property into possession. Mr. Molony tried to get out of it by contending that if an advancement was made, it was to be made out of cash, and cash might be produced by savings of income. But the words of the will, which describe the subject of the power, are not confined to cash. There was no obligation to save income, and advancement is usually made out of capital. The words of the testator are—"The rest, residue, and remainder of my property, real,

(1) 1 Sch. & Lef. 88.

(2) L. R. 5 Eq. 150.

Appeal. freehold, and chattel." He did not confine the power to his cash,
 1902. though cash must be provided before an advancement could be
L'ESTRANGE made. Before any advancement could be made the share of each
v. child would have to be segregated, so that each advancement
L'ESTRANGE. might be made, not out of the property as a whole, but only out
Fitz Gibbon, of the share of the child who was to receive the advance. This
L.J. negatives joint tenancy.

In my opinion the appeal is wholly unsustainable..

HOLMES, L. J. :—

The only ground upon which it would be possible to support this appeal would be by showing that the advancement to the children, which, by the terms of the will, the trustees are given power to make, is an advancement out of the whole of the property, and not out of the share of it devised and bequeathed to the child to whom the advancement is made. But this is opposed to the idea of advancement, which is a term of legal art. It implies that it is to be made out of the property to which the person advanced is actually or contingently entitled. It is now well settled that where a devise or bequest is made to children, followed by a power of advancement, such a power is inconsistent with a joint tenancy in the children, and upon this principle we hold that they took as tenants in common.

Solicitors for the appellants : *Findlater & Co.*

Solicitors for the respondents : *W. R. Meredith & Son.*

R. D. M.

AGNEW v. KING.

(1901. No. 1051.)

V.-C.

1902.

June 13.

Mortgage—Transfer with concurrence of mortgagor—Arrears of interest paid by transferee treated as principal bearing interest.

Transferee of a mortgage, the mortgagor joining in the transfer, *held*, entitled to treat as principal bearing interest arrears of interest on the original debt due at the date of the transfer, and paid by him to the mortgagee.

ACTION for redemption.

The principal question in this case, and that on which it is reported, was whether the defendant as transferee of the mortgage of the 14th August, 1882, was entitled to treat as principal carrying interest arrears of interest on the original debt due to the mortgagee at the date of the transfer, and paid to him by the defendant.

By indenture, dated the 14th August, 1882, in consideration of £90 paid by Joseph Sloan to Robert Agnew, Charlotte Agnew, and William Thompson, the last-mentioned three parties covenanted to pay to Joseph Sloan, on the 14th August, 1883, the sum of £90, with interest in the meantime at 6 per cent. per annum, and also if any part of the said sum should remain unpaid after that date, to pay interest on the part so remaining unpaid at the rate aforesaid; and the said Robert Agnew and Charlotte Agnew assigned to the said Joseph Sloan certain lands, held under a lease for years, subject to a proviso for redemption on payment of the said sum of £90 with interest, on the date aforesaid.

The plaintiffs Mary Agnew and Sarah Agnew alleged that previous to the 2nd May, 1900, the equity of redemption became vested in them. The interest of Joseph Sloan became vested in Matthew Sloan.

By an indenture, dated the 2nd May, 1900, and expressed to be made between the said Matthew Sloan of the first part, the plaintiffs Mary Agnew and Sarah Agnew of the second part, and

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the defendant James King of the third part, reciting (amongst other matters) that by the indenture of the 14th August, 1882, in consideration of £90 paid by Joseph Sloan, Robert Agnew and Charlotte Agnew assigned to him the said lands by way of mortgage to secure the repayment of the said sum of £90 and interest thereon as therein expressed, that there was then due to the said Matthew Sloan for principal and interest on the security thereof, the sum of £131 14s. 5d., and that the said James King had, at the request of the said Mary Agnew and Sarah Agnew, agreed to pay to the said Matthew Sloan the said sum of £131 14s. 5d. upon having such transfer of the said mortgage debt and interest and of the securities for the same as was thereafter contained, it was witnessed that in pursuance of the said agreement and in consideration of £131 14s. 5d. paid to the said Matthew Sloan by the said James King, at the request of the said Mary Agnew and Sarah Agnew, being the proper amount due on foot of the said indenture of mortgage, the said Matthew Sloan assigned to James King all that the said sum of £131 14s. 5d. then owing to the said Matthew Sloan on the security aforesaid, and all interest due and to accrue due for the same, and the full benefit of the covenants by the said Robert Agnew, Charlotte Agnew, and William Thompson in the said indenture of mortgage, and of all other securities for the same moneys; and it was also witnessed that in further pursuance of the said agreement, and for the consideration aforesaid, the said Matthew Sloan assigned the said lands to James King, subject to the equity of redemption subsisting therein under the said indenture of the 14th August, 1882, and with the benefit of the power of sale therein contained.

Before action the plaintiffs tendered a sum sufficient to cover the original loan of £90 and arrears of interest on the same, but the defendant declined to accept it.

Matheson, K.C. (with him *M'Cutcheon*), for the plaintiffs:—

There are some loose statements in the old cases as to the effect of a mortgagor concurring in a transfer of a mortgage. It is now, however, well settled that if the mortgagor do not concur, the principal mortgage debt remains the same as before, and it is immaterial how much is paid by the transferee. The mortgagor

may join, and there may be an agreement by him to change arrears of interest into principal; but to effect this there must be a definite agreement in writing entered into at the time: see 2 Robbins, Law of Mortgages, 1164. In the absence of agreement to the contrary the rule is that arrears of interest do not carry interest: see 1 Eq. Cas. Abr., 287, and the cases there cited, and *Cottrell v. Finney* (1), and the judgment in that case of Sir W. M. James, L.J. He says (pp. 547, 548):—"It has not been contended before us, and, as I understand, it was not contended in argument before the Vice-Chancellor, that the sum paid for interest and the sum paid for costs upon that occasion could be converted into principal so as to bear interest. The modern practice of the Court in this respect is well settled, although it certainly differs very much from some old cases which I have before me; in which it seems to have been held as a matter of course that upon a reasonable transfer of a mortgage security to a transferee, all sums paid were converted into principal. I have been particularly struck with *Lord Chesterfield v. Lady Cromwell* (2), where this was done: the Lord Chancellor being reported to have said, 'that though regularly interest shall not carry interest, yet that in some cases and some circumstances it would be injustice if interest should not be made principal; and the rather in this case because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.' There seems to me to be a great deal of good sense in that judgment, although the rule of the Court is now otherwise, and accordingly it has not been contended before us that the transferee can have anything more than what was actually paid for interest and costs, without interest upon it."

In the present case there is nothing but the fact that the owners of the equity of redemption joined in the deed of the 2nd May, 1900; that is an ordinary deed of transfer, and it is apparent that the plaintiffs were made parties only for the purpose of binding them as to the correctness of the account.

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(1) L. R. 9 Ch. 541.

(2) 1 Eq. Cas. Abr. 287, pl. 1.

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Ronan, K.C., and Christie, for the defendant :—

Where a mortgagor concurs in a transfer, the law implies a contract to convert arrears of interest into principal. There is a difference between the earlier and more modern cases in the way the general rule is laid down. In 3 Seton, Judgments and Orders (6th ed.), p. 1944, the law is stated thus:—"Upon a transfer of a mortgage the transferee will not be entitled to interest upon arrears of interest paid by him to the transferor, unless the mortgagor be a party, or consent to the transfer"; and the case of *Ashenhurst v. James* (1) is cited. That was a decision of Lord Hardwicke, given in 1745; its authority has never been questioned, and his judgment is given as the basis of the law in every text-book. He states the general rule to be, that where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest; but where it is assigned without the consent of the mortgagor, the assignee must take it only upon the same terms with the assignor. If that be a correct statement of the law, the defendant's contention here is right. See also 2 Davidson's Precedents (4th ed.), part 2, p. 273, where the law is stated to the same effect, and *Ashenhurst v. James* (1) is cited; Fisher, Law of Mortgage (5th ed.), 865. In cases before *Ashenhurst v. James* (1) the rule that arrears of interest due on a transfer should be taken as principal was laid down in general terms without confining it to cases where the mortgagor concurred. In *Smith v. Pemberton* (2), *Anonymous* (3), and *Gludwyn v. Hitchman* (4), no distinction is taken between cases in which the mortgagor joins, and those in which he is not a party. Lord Hardwicke had those cases before him in *Ashenhurst v. James* (1), and he corrects the rule in its generality by drawing that distinction; but the only alteration he makes is the limiting it to cases where the mortgagor concurs. See also Fisher, Law of Mortgage (4th ed.), 893, where the old and the later rules are stated, and 2 W. & T. L. C. (7th ed.), 36. In *Earl of Macclesfield*

(1) 3 Atk. 270.

(3) 1 Ch. Ca. 258.

(2) 1 Ch. Ca. 67.

(4) 2 Vern. 135.

v. *Fitton* (1) it was admitted in the argument for the plaintiff that if the mortgagor had joined, arrears of interest would be principal, and the decision was that, even under the circumstances of that case, interest should be treated as converted. See also *Anon.* (2). In *Cottrell v. Finney* (3) no case was cited by counsel on the question of the conversion of interest into principal, no such question was argued, and the observations of James, L.J., cannot be taken as overruling Lord Hardwicke's statement of the law. In *Lord Chesterfield v. Lady Cromwell* (4), to which he refers, the mortgagor was a minor, and could not concur. There is no decision overruling *Ashenhurst v. James* (5).

In the present case the transfer deed recites that the defendant had, at the request of the plaintiffs, agreed to pay the sum of £131 14s. 5d., and in the operative part, in consideration of that sum stated to have been paid at their request, Matthew Sloan assigns the sum of £131 14s. 5d. then owing, and all interest to accrue due for the same, *i.e.* on the consolidated debt. The express lumping of principal and interest is of itself evidence of an intention to convert the latter into principal—the consideration money is capitalized. The proviso for redemption is inconsistent with the agreement to pay interest on the total sum due, and cannot be relied on: see *Bolton v. Buckenham* (6). The plaintiffs would have been sold out unless the defendant made the advance, and there can be no distinction between the different parts of the money he lent. The case is similar to *Lord Chesterfield v. Lady Cromwell* (4).

M^cCutcheon, in reply:—

In *Cottrell v. Finney* (3) James, L.J., lays down distinctly the modern practice as different from the old, and it is against the rule contended for by the defendant. In that case the transfer was of the principal and interest, "making together the sum of £2986 7s. 5d.," and the property was conveyed, subject to the old equity of redemption, just as here.

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(1) 1 Vern. 168.

(2) Bun. 41.

(3) L. R. 9 Ch. 541.

(4) 1 Eq. Cas. Abr. 287, pl. 1.

(5) 3 Atk. 270.

(6) [1891] 1 Q. B. 278.

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THE VICE-CHANCELLOR said that he must take it to be now fairly well settled that where an arrear of interest is assigned, and the mortgagor is a party to the transfer, a contract will be presumed that the interest is to be capitalized. He considered, moreover, that in this case, even on the deed itself, there was evidence of an intention to consolidate the principal and interest.

He dismissed the action on these and other grounds.

Solicitors for the plaintiffs: *M'Caughey & Co.*

Solicitor for the defendant: *Adrain.*

D. M'C. M.

FITZGERALD v. FITZGERALD.

M. R.
1901.*Settlement—Rectification—Mistake—Limitation of real estate without words of inheritance—"In tail"—No evidence of intention dehors the deed.*

June 27.

Appeal.

Nov. 11.

Dec. 16.

By a marriage settlement, executed in the year 1859, lands belonging to the sister of the husband were, subject to her life estate, limited to the husband for life, with remainder (in default of exercise of a power of appointment given to him), if there should be only one child of the marriage, to such child "in tail." The only interest limited back to the settlor was a general power of appointment in default of issue of the marriage. A power of sale and a leasing power were given to the trustees exercisable during the respective lives of the two tenants for life, with their respective consents, and during the minority of any child of the marriage. There was no evidence of the intention of the parties apart from the settlement itself, the instructions on which it was prepared not being forthcoming, and the solicitor who prepared it, as well as the parties to it, being dead. There was only one child of the marriage, the plaintiff, who brought this action against the heir-at-law of the settlor and the trustees, seeking to have the deed reformed by the insertion of proper words of limitation, so as to confer on her an estate tail in the lands:—

Held (by the Court of Appeal, affirming the decision of the Master of the Rolls), that the deed itself afforded evidence of the intention of the parties sufficient to enable the Court to rectify the mistake and to reform the settlement by the introduction of technical words of limitation, so as to confer an estate tail on the plaintiff.

In re Bird's Trusts (3 Ch. D. 214) approved and followed.

TRIAL OF ACTION.

This action was brought by the plaintiff, Helen Maria Fitzgerald, seeking—(1) a declaration that the settlement executed upon the marriage of her father and mother should be rectified and reformed in such manner and form as that in the events that had happened she should take thereunder an estate tail in the property thereby settled; (2) a declaration that by the limitation in the said settlement contained in default of appointment by her father, Stephen Fitzgerald, if there should be only one child of the marriage, it was intended to confer on such child, not a life estate, but an estate tail, and that the said indenture

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ought to be rectified by reading the same as if the said limitation were framed in the words, "To the use of such child and the heirs of his or her body"; and (3) that a copy of such declaration should be endorsed on the said settlement.

By indenture, dated the 23rd day of September, 1859, and made between Maria Fitzgerald of the first part, Stephen Fitzgerald, her brother, of the second part, Wm. Talbot Crosbie and S. M. Hussey (thereinafter called "the trustees") of the third part, being a settlement executed in contemplation of a marriage then intended, and shortly afterwards celebrated, between the said Stephen Fitzgerald and Margaret Story—the said Maria Fitzgerald granted unto the trustees and their heirs the lands of Kilbride Pass, therein described, to hold the same unto the said trustees and their heirs TO THE USE of Maria Fitzgerald, her heirs and assigns, until the said intended marriage, and from and after the solemnization thereof TO SUCH USES as Maria Fitzgerald should, in the event of her marriage, appoint, and subject thereto TO THE USE of Maria Fitzgerald for life, with remainder TO THE USE of Stephen Fitzgerald for life, with remainder limited *verbatim* in the words following:—"TO THE USE of the child or all or such one or more of the children or other issue born in the lifetime of the said Stephen Fitzgerald, or his now intended wife, of the said now intended marriage for such estates or estate, and in such shares and proportions and manner and form in every respect as the said Stephen Fitzgerald shall by deed or deeds or testamentary instrument appoint, and in default of and until such appointment, and so far as any such appointment shall not extend if there be only one child of the said now intended marriage TO THE USE of such child in tail."

The marriage settlement next provided that if there should be two or more children of the intended marriage (so far as Stephen Fitzgerald should not appoint), the lands should go TO THE USE of all, every, or such or one or more of such children or other issue as aforesaid of the marriage for such estates, and in such shares as Maria Fitzgerald, in case she should survive Stephen Fitzgerald, should by deed or will appoint, and in default of such appointment "TO THE USE of all the children of the said intended marriage who shall attain the age of twenty-one years as tenants in common

in tail, and for default of such issue TO SUCH USES upon such trusts, and for such ends, intents, and purposes, and under and subject to such powers, provisos, and declarations, as the said Maria Fitzgerald, notwithstanding her coverture, shall by will or testamentary instrument appoint." M. R.
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The settlement then conferred certain powers on the trustees for the management of the premises, the maintenance and education of the children of the marriage, and the accumulation and investment of the rents and profits of the lands. It enabled Maria Fitzgerald during her life, and after her death Stephen Fitzgerald during his life, and after the death of the survivor, the trustees during the minority of any child of the marriage, to make leases of the lands. It provided that the trustees might sell the lands thereby settled with the consent of Maria Fitzgerald during her life, and after her death with the consent of Stephen Fitzgerald during his life, and after the death of the survivor of them, during the minority of any child of the marriage at the discretion of the trustees, and should lay out the money received upon any sale in the purchase of other lands to be settled to the uses, upon the trusts and subject to the powers thereby limited, and that until such money should be so laid out the trustees should invest the same and pay the income thereof as therein mentioned.

Maria Fitzgerald died on August 15, 1893, without having ever been married, and without having made, or purported to make, any further or other disposition or appointment, by will or otherwise, affecting the said lands. Her will, dated April 10, 1885, and proved with six codicils thereto, on September 26, 1893, did not in anywise deal with the lands, and contained no residuary devise of real estate.

Stephen Fitzgerald died on December 17, 1893, without having exercised the power of appointment conferred on him by the settlement, and leaving him surviving the plaintiff, who was the only child born of the marriage solemnized between him and Margaret Story. The plaintiff was born in the year 1861.

During the lifetime of Maria Fitzgerald the lands were sold under the power of sale in the settlement, and the proceeds invested in Railway Stock in the names of the trustees.

On June 30, 1894, the plaintiff was declared to be of unsound

M. R. mind by an order of the Lord Chancellor of Ireland made "in
1901. the matter of Helen Maria Fitzgerald, a person of unsound mind,"
FITZGERALD and in pursuance of a subsequent order made in the same matter
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FITZGERALD. the trustees transferred the said Railway Stock to credit of the
lunacy matter, and separate credit of the trusts of the said
settlement.

The plaintiff subsequently recovered her reason, and on the 24th day of February, 1900, was by an order made in the said matter discharged out of lunacy. On the 10th of March, 1900, she executed a disentailing deed, which was subsequently enrolled, by which she disentailed the said sum of Railway Stock. The plaintiff then applied in the said lunacy matter to have the said Railway Stock transferred out of Court to her, and that if necessary the settlement should be treated as rectified so as to confer on her an estate tail in the property. The defendant, Sir Maurice Fitzgerald, who was the heir-at-law of Maria Fitzgerald, opposed the application, which was refused by the Lord Chancellor, who directed the dividends of the Railway Stock to be paid to the plaintiff. Subsequently the trustees of the settlement applied to have the Stock retransferred to them; the plaintiff opposed this course, and the Lord Chancellor allowed the matter to stand over so as to enable the plaintiff to take such steps as she might be advised to reform the settlement. The plaintiff thereupon brought the present action, naming Sir Maurice Fitzgerald and the trustees as defendants.

The statement of claim set out the foregoing facts, and submitted that the frame of the settlement showed that it was the intention of the parties to confer an estate tail on the plaintiff and not a life estate, that this intention was defeated by the mistake of the draftsman in using the words "in tail" instead of the proper technical words of limitation, and prayed that the settlement might be reformed to carry out the intention of the settlor.

The trustees put in a formal defence, and the heir-at-law submitted that the intention of Maria Fitzgerald was to secure that the lands should, so far as the rules of law would permit, be secured to the Fitzgerald family to which she belonged, that the settlement was framed for this purpose and carried into effect her intentions in the matter.

At the trial the plaintiff produced Mr. J. R. Lloyd, who was articulated to the late Mr. Samuel Adair, the solicitor whose name appeared on the settlement, and who had been solicitor for the Fitzgerald family, but who was long since dead. The witness knew nothing of the settlement or of its preparation beyond this. He had made a search amongst Mr. Adair's papers for any instructions, entries, or memoranda relating to the settlement, but none could be found. There was no other evidence produced except the settlement itself, and the several facts above stated were admitted.

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Matheson, Q.C., and *Dixon*, for the plaintiff.

Ronan, Q.C., and *Morphy*, for the defendants.

The arguments are fully reported in the Court of Appeal.

THE MASTER OF THE ROLLS:—

I have formed an opinion in this case, which I may as well express at once. The action is brought by the plaintiff to reform a settlement of September 23rd, 1859, executed in contemplation of the marriage of Stephen Fitzgerald and Margaret Story, by which certain lands called Kilbride Pass were put in settlement. The settlor Maria Fitzgerald was not married, she was a sister of Stephen Fitzgerald, the intended husband. By this settlement, which was made between Maria Fitzgerald of the first part, Stephen Fitzgerald her brother of the second part, and William Talbot Crosbie and the defendant Samuel Murray Hussey, trustees, of the third part, the lands were limited after the marriage to the use of Maria Fitzgerald for life, with remainder to the use of Stephen Fitzgerald for life, with remainder "to the use of the child, or all, or such one or more of the children or other issue born in the lifetime of the said Stephen Fitzgerald, or his now intended wife, of the said now intended marriage, for such estates or estate, and in such shares and proportions, and manner and form, in every respect as the said Stephen Fitzgerald shall by deed or deeds or testamentary instrument appoint, and in default of and until such appointment, and so far as any such appointment shall not extend, if there be only one child of the said now intended marriage, to the use of such child in tail." The

M. R. settlement then provides that if there should be two or more
1901. children of the intended marriage (so far as Stephen Fitzgerald
FITZGERALD should not appoint), the said lands should go to the use of all,
v.
FITZGERALD. every, or such one or more of such children, or other issue as
aforesaid, of the marriage for such estates and in such shares as
the said Maria Fitzgerald, in case she should survive the said
Stephen Fitzgerald, should by deed or will appoint, and in default
of such appointment "to the use of all the children of the said
intended marriage who shall attain the age of twenty-one years
as tenants in common in tail."

The settlement was prepared by the late Mr. Samuel Frederick Adair, a well-known solicitor in this city. It bears his name, but that is all we know about it. It was executed, as I said, in 1859. It is not surprising therefore that there are no documents forthcoming from the office of the solicitors who took over Mr. Adair's business or from elsewhere to throw any light upon it, no entry in any book, and no witness living to tell anything about it.

The plaintiff, who seeks to have the settlement reformed, was the only child of the marriage, and was born in the year 1891, and it appears that she became of unsound mind, and was so declared by an order of the Lord Chancellor of June 30th, 1894, but subsequently recovered her reason, and was discharged out of lunacy by order of February 24th, 1900.

Maria Fitzgerald and Stephen Fitzgerald died in 1893, and the plaintiff claims in default of appointment by her father as the only child of the marriage.

It appears that the lands were sold by the trustees under a power of sale contained in the settlement, and are now represented by a sum of Great Southern and Western Railway Stock, which devolves in the same way as the lands.

Sir Maurice Fitzgerald, the nephew and heir-at-law of the settlor, is one of the defendants, the others being the present trustees of the settlement. He contends that the deed must stand as it is, and that whatever may be the case with regard to words in marriage articles, or as to the effect of a recital in a deed, the words here are not strong enough to pass any estate of inheritance, so as to give the plaintiff an estate tail. There are no words of inheritance or procreation without which an estate tail could not have been created by the deed.

That this would be so at common law, or if the question was one of mere construction, taking the words as they stand, there is no doubt, as is established by numerous authorities, of which *Meyler v. Meyler* (1) is an example.

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Apart, however, from the legal effect of the instrument, no human being, knowing that this is a marriage settlement, the primary intention of which must include a provision for the issue of the marriage, could read this document without seeing that the intention was to confer an estate tail on the child of the marriage—the words are “to the use of such child in tail”—and that ought to have been done. If Mr. Adair had been as wide-awake as he should have been, the words “heirs of the body” would have been put in. It appears from the statement of claim that there was some discussion in the Lord Chancellor’s Chambers as to the effect of the deed, but no decision given upon it. The plaintiff says that it is plain that by some mistake common to all parties an estate for life only was conveyed and not an estate tail, and that this is the very case where the Court will interfere and rectify the mistake.

It is not doubted that the jurisdiction to rectify exists, *e.g.* on extrinsic evidence being forthcoming. Extrinsic evidence must be adduced to satisfy the Judge that there has been a plain blunder, and proof given of what was intended to be done. This extrinsic evidence is often not very trustworthy; sometimes there is a scrap of paper; sometimes it must depend on the slippery memory of an attorney’s clerk; for all that the Court has to grapple with the words and set the mistake right. It is said that the Court never acts on intrinsic evidence—that is to say, from the words of the deed itself. It was argued by Mr. Ronan and Mr. Morphy that the Court has no power to act on such evidence, and yet at the same time it is said that there is no mistake, or if there is, that there is no power to rectify. On the question of mistake, which is more satisfactory—the language of the settlement, or the evidence depending on slippery memory? Oral evidence, or the evidence of letters or entries, could not add to the certainty I entertain without them in this case, that there

M. R. was a mutual mistake in drawing the deed as it stands, and what
 1901. the exact nature of that mistake was, and how to correct it.

FITZGERALD The intrinsic evidence on the face of the deed is infinitely the
v. stronger and more coercive. Then it is said that this never was
FITZGERALD. done; I pointed out during the argument that I did it in *Ex parte*
Rice (1). In so doing I followed *Bird's Trusts* (2). But it was
 done in an old case in *Peere Williams* (3), and in *Annesley v.*
Annesley (4) by the Vice-Chancellor. I quite admit that *Annesley*
v. Annesley (4) is not on all fours with the present case; there
 was no doubt a recital in that case, and none in the present case,
 but that only goes to the weight of the evidence of intention.
 So in *Bird's Trusts* (2), the word "heirs" was introduced through-
 out by Malins, V.-C. It is utterly immaterial whether the Court
 treats the instrument as if it was reformed, or reforms it in an
 independent proceeding brought for the purpose. These are the
 authorities, and there are probably others. It would require
 strong authority for me to hold that I might rely on extrinsic
 evidence and not on intrinsic evidence.

Then, again, it was said that you may perhaps act on intrinsic
 evidence furnished by a recital in the document, but that you
 cannot act on the operative words of the document itself. There
 is no authority for that. Anyone reading the words of the deed here
 would know what was intended, just as if there had been a recital
 of an intention or agreement to convey *in tail*. It is just as clear.
 I am not able to appreciate the distinction.

I come now to the instrument itself. It is a marriage settle-
 ment, not made in pursuance of marriage articles. The intention
 is that the children of the marriage are to get an estate tail.
 Mr. Dixon was correct in pointing out that the leasing power and
 power of sale only extend during the minority of a child of the
 marriage, and show presumably that on a child attaining age he
 or she would have a disposing power, and that the whole is con-
 sistent with the intention that a child should have an estate tail.
 The argument for the defendant is shortly this. This is a deed;
 as it stands it only gives a life estate; you have nothing to correct
 it by; it is no matter that the deed uses the words "estate tail";

(1) 30 I. L. T. R. 57.

(3) 2 P. W. 151.

(2) 3 Ch. D. 214.

(4) 31 L. R. Ir. 457.

it only gives a life estate for all that: other cases must be dealt with as they arise. The tendency, however, of modern decisions is to correct manifest mistakes in the exercise of the jurisdiction which has always existed in Courts of Equity. The settlement must be rectified as prayed, and a copy of the order rectifying it endorsed on the settlement.

M. R.
1901.

FITZGERALD
v.
FITZGERALD.

The curial portion of his Lordship's order was as follows:—

“THIS COURT doth declare that by the limitation contained in the said indenture of settlement, dated the 23rd of September, 1859, in default of appointment by Stephen Fitzgerald, if there should be only one child of the marriage, it was intended to confer on such child, not a life estate, but an estate tail, and that the said indenture ought to be rectified by reading the same as if said limitation were framed in the words—‘To the use of such child, and the heirs of his or her body.’ And it is ordered that a copy of this judgment be endorsed on the said indenture of settlement.”

W. L.

The defendant Sir Maurice Fitzgerald appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Walker, and Holmes, L.JJ.).

Appeal.
Nov. 11.
Dec. 16.

Ronan, K.C., and *Morphy*, for the appellant:—

The legal construction of this deed gives only an estate for life to the plaintiff: you can gather the intention of the settlor only from the legal construction of the words used. Apart from sect. 51 of the Conveyancing Act, it is a rule of law that the words “heirs of the body” are absolutely necessary to create an estate tail: Coke upon Littleton, 20a, 20b; Shep. Touch. 106; 2 Blackstone, pp. 107, 115; Cruise, Digest, iv., p. 277. The intention of the parties can only be ascertained in accordance with the rules of law in construing a deed. It is a positive rule of law that the word “heirs” must be used if it is intended to create an estate of inheritance: this rule of law is enforced, like the rule in *Shelley's Case* (1), quite independent of intention, and even so as to defeat what would

(1) 1 Rep. 93 (b).

Appent. otherwise be supposed to be the intention of the parties: *Van*
 1901. *Grutten v. Foxwell* (1). Therefore, the words "in tail" used in
 FITZGERALD the *habendum* of this deed cannot be treated as evidence of an
 v. intention to confer an estate tail. Except these words there is
 FITZGERALD nothing else relied upon as evidence of such intention. You must
 find some evidence *dehors* the deed itself of the intention of the
 parties before you can ask to have it rectified: *Taggart v.*
Taggart (2); *Phillips v. James* (3); *Marquis of Breadalbane v.*
Marquis of Chandos (4); *Earl Bradley v. Earl Romney* (5). Possibly
 a recital in the deed might prove the intention sufficiently, but
 that is only because it would be evidence of an antecedent agree-
 ment. In *Barstow v. Kilvington* (6) the deed was reformed on
 the evidence contained in a letter. In *Holliday v. Overton* (7);
Meyler v. Meyler (8); *Re Whiston's Settlement* (9); *Re Bennett's*
Estate (10); for want of words of limitation in marriage settlements
 framed like this one, it was held that the several donees only took
 life estates. It was not suggested in any of those cases that the
 settlement could be reformed so as to confer an estate of inheritance.
 Yet, if the respondent's contention is correct, all these deeds could
 have been so reformed. So too in *Wheeler v. Duke* (11), where the
 gift was to A B "and his issue." *Ethel and Mitchell's and Butler's*
Contract (12) shows that the rule has not been altered by the Con-
 veyancing Act except the terms of the statute are strictly complied
 with. In *Uvedale v. Halfpenny* (13) the intention to charge the por-
 tions for younger children was plain, and even if there had been no
 term the Court would have raised the portions. *Bird's Trusts* (14)
 and *Ex parte Rice* (15) are not rightly decided. The form of the order
 appealed from shows the difficulty the learned Master of the Rolls
 felt; he has not directed the deed to be rectified, but only to be
 read as if rectified by reading in the words of limitation. [They
 also cited *Doran v. Ross* (16).]

(1) [1897] App. Cas. 677.

(2) 1 Sch. & Lef. 84.

(3) 3 DeG. J. & S. 72; 2 Dr. & Sm.

(4) 2 My. & Cr. at p. 739. [404.

(5) 30 Beav. 431.

(6) 5 Ves. 593.

(7) 14 Beav. 467.

(8) 11 L. R. Ir. 522.

(9) [1894] 1 Ch. 661.

(10) [1898] 1 I. R. 185.

(11) 1 C. & M. 210.

(12) [1901] 1 Ch. 945.

(13) 2 P. Wms. 151.

(14) 3 Ch. D. 214.

(15) 30 I. L. T. R. 57.

(16) 1 Ves. Jun. 57.

Matheson, K.C., and *G. Y. Dixon*, for the respondent :—

Appeal.
1901.

FITZGERALD
v.

FITZGERALD.

Admittedly the legal construction of this deed confers on the plaintiff a life estate only. But the frame of the deed shows that the intention was to confer an estate in tail. This intention can be gathered by the use of the words "in tail" in the *habendum*, the limitation "for default of issue" of the marriage to such uses as the settlor might appoint, and the fact that the leasing power and the power of sale and exchange were given to the trustees only during the minority of any child of the marriage. There is no rule, such as is contended for by the appellant, that the intention of the parties is to be gathered from the legal construction of the deed. In *Owen v. Smyth* (1) it was sought to establish a rule to this effect, but Eyre, C. J., pointed out that it was quite possible to see an intent on the face of a deed which the words used were not sufficient to effectuate. To the same effect is the judgment of Lord Kenyon, C. J., in *Doe v. Martin* (2). The appellant's contention confuses the intention with the operation of a deed. Where the intention of the parties is plain, and the form of the deed does not in law effectuate that intention, a Court of Equity, in order to carry out the intention, will reform the deed, or even may treat the deed as reformed without actually remodelling it. A Court of Equity will aid the intention of the parties to a deed by inserting words of limitation where they are omitted by mistake: 2 Com. Dig. "Chancery" (2 T. 1.), p. 569. The intention may be proved and generally is proved *aliunde*, but in some cases a deed has been reformed to carry out the intention which is disclosed without other evidence by the plan or frame of the deed itself: *Uvedale v. Halfpenny* (3); *Fenton v. Fenton* (4). In *Bird's Trusts* (5) and *Ex parte Rice* (6) the Court gathered the intention that the donee was to take a fee-simple in the settled lands from the fact that chattels real which the donee would take absolutely were settled along with the lands. In *Barstow v. Kilvington* (7) the intention of the parties was evidenced only by a letter written long after the execution of the deed. Here the deed, though

(1) 2 H. Bl. 594.

(2) 4 T. R. 39, at p. 65.

(3) 2 P. Wms. 151.

(4) 1 Dr. & Walsh, 66.

(5) 3 Ch. D. 214.

(6) 30 L. L. T. R. 57.

(7) 5 Ves. 593.

Appeal. informal as a conveyance, is a written statement under the
 1901. hand of the settlor of at least equal weight with the letter in
 FITZGERALD *Barstow v. Kilvington* (1). In *Averall v. Wade* (2) the limitation
 n. in a marriage settlement was "to the use of the first and every
 FITZGERALD. other son of the marriage in tail male," and it was argued that
 the settlement was defective, as no words of procreation were used,
 but Lord St. Leonards (at p.250) overruled the argument, observing :
 "It is first said that the settlement is informal, and did not execute
 its purpose; it is, however, a good settlement in equity, and the
 Court will effectuate the intent of the parties. That is a settled point.
 I must, therefore, consider the settlement as if actually remodelled."

In *Holliday v. Overton* (3), *Meyler v. Meyler* (4), *Re Whiston's Settlement* (5), and *Re Bennett's Estate* (6), the only point involved was the construction of the deed; and it was decided that for want of words of limitation only a life estate was thereby conferred. But in none of those cases was there anything by which the deed could be rectified if it did not carry out the intention of the parties. There was not, as there is here, and as there was in *Averall v. Wade* (2), a popular expression verbally equivalent thereto, substituted for the words of limitation, by which the intention to confer an estate tail is proved. In those cases it would be impossible to say what estate, if any, larger than a life estate was intended to be conferred. There was nothing to show whether it was intended that the donee was to take an estate tail or an estate in fee-simple. In order to rectify a deed you must show not only that there is a mistake, but also what the mistake is, and what ought to be there instead of it. In *Milner v. Milner* (7), Lord St. Leonards refused to rectify a deed where the words of limitation were omitted, because the evidence left it uncertain what estate was intended to be conferred.

In *Ethel and Mitchell's and Butler's Contract* (8) it was attempted to show on the construction of the deed on a vendor and purchaser summons that an estate in fee-simple passed, though the technical words were not used. It was not a case in

(1) 5 Ves. 593.

(2) Ll. & G. temp. Sugden. 252.

(3) 14 Beav. 467.

(4) 11 L. R. Ir. 522.

(5) [1894] 1 Ch. 661.

(6) [1898] 1 I. R. 185.

(7) 8 Ir. Eq. R. 488.

(8) [1901] 1 Ch. 946.

which rectification was sought. Though Joyce, J., held that he could not construe the deed as contended, he said: "To my mind it is perfectly plain, *upon a mere perusal* of this reconveyance, that the deed was framed as it is by accident, or through inadvertence, ignorance, or carelessness, and that if necessary the vendor is entitled, as a matter of course, to have the reconveyance rectified." The form of the order appealed from is quite right: Seton on Decrees (6th Ed.), p. 1712 (9).

[They also referred to *Coates v. Kenna* (1), *Champ v. Champ* (2), and 2 Preston on Estates p. 64.]

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1901.
Fitzgerald
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Fitzgerald.

LORD ASHBOURNE, C.:—

Dec. 16.

The question in this appeal arises on the terms of a marriage settlement, executed in the year 1859, by which certain lands were settled, which are now represented by the funds in Court. The estates in the lands limited by the settlement are—first, a life estate to Miss Maria Fitzgerald, the settlor; then a life estate to her brother Stephen, on whose marriage the settlement was made, with remainder to the use of the children of the marriage for such estates as Stephen Fitzgerald should by deed or will appoint, and in default of such appointment, if there should be only one child of the marriage, "to the use of such only child *in tail*." There was only one child born of the marriage, the plaintiff in this action. Miss Maria Fitzgerald has died, and Stephen Fitzgerald has died without exercising the power of appointment conferred on him by the settlement. On these facts the question is now raised—Is there evidence of an intention on the part of the settlor to confer an estate tail in the property on the plaintiff, and should the deed be rectified so as to carry out this intention? It is not a question of construction. It is admitted by the plaintiff that in construing the deed the words used are not sufficient to effectuate the intention of the parties, but she seeks to have the deed rectified by the substitution of appropriate words in order to carry out that intention. It has been argued on her behalf that there is on the face of the settlement itself abundant evidence

Appeal. of the settlor's intention to give an estate tail to the plaintiff in
 1901. the events that have happened, and that this intention would
 FITZGERALD be set at naught by the rules of construction if the deed is not
 v.
 FITZGEEALD. rectified.

Lord
 Ashbourne, C.

It was argued by the appellant that for the purpose of establishing a case for rectification you must gather the intention of the parties from evidence *dehors* the deed itself, and Mr. Ronan contended that the cases in which the Court gathered the intention from the recitals did not violate this supposed rule, because the recitals were evidence of antecedent agreements. Mr. Ronan further contended that no inference of the intention of the parties could be drawn from the words "in tail," because as those words occurred in the operative part of the deed they could afford no evidence of an intention to confer any larger estate than they actually gave by the rules of law.

The usual object of the parties to a marriage settlement is to provide that the settled property shall ultimately devolve upon the issue of the marriage. By the express terms of this settlement a power was given to the plaintiff's father by which—if he had executed it—he could have bestowed on her the fee-simple of these lands. Because he did not execute this power, it is said that, as the settlement omits the usual words of inheritance and only uses the words "in tail," we are to shut our eyes to the obvious import of what those words imply. To my mind it would be painful to be driven by any technical rule to such a conclusion. In interpreting the language used for the purpose of ascertaining the intention of the parties, as distinct from the construction of the deed, I can see no supreme difference between the different parts of the document. The powers of leasing and of sale were rightly relied on by the respondent's counsel. No doubt they coincide with the view that it was intended that the plaintiff should take more than a life estate. But I put all these matters aside as insignificant beside the words "in tail." I find in them a plain indication of the intention of the parties, so strong that I do not feel at liberty to disregard it. The cases cited by the Master of the Rolls and in the course of the argument before us show that there is ample authority for the conclusion at which I have arrived. I regard this case as one in which I

should do violence to the obvious meaning of the parties if I refused the relief asked for by the plaintiff.

In my opinion, the decision of the Master of the Rolls is right, and should be affirmed with costs.

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1901:

FITZGERALD
v.
FITZGERALD.

FITZ GIBBON, L. J. :—

I am duly deferential to the venerable authorities which have been cited. I absolutely accept, as a rule of law resting upon foundations which it would be sacrilegious to shake, that, apart from the Conveyancing Act, no deed can create an estate tail without the words "heirs of the body," or equivalent words of procreation. Further, I think that the language of the Conveyancing Act plainly shows that a deed previously executed, which contained words which the Act made sufficient to create an estate tail, had not the effect which the Act gave for the first time to those words. The restriction of the Act to deeds executed after its passing prohibits its application to any earlier instrument. This deed, therefore, as it stands, does not give an estate tail to the plaintiff, and the only open question is—Can it be rectified?

In my opinion it can—on clear and recognized rules of equity. The opposition to rectification rests upon an endeavour to restrict those rules in a manner not warranted by authority. The intention of the parties here may be gathered from—(1) the fact that this is a marriage settlement, the object of which is to provide for the issue of the marriage; (2) the use in the *habendum* of the words "in tail"; (3) other provisions in the settlement which indicate that, in the events which have happened, the plaintiff was intended to take more than a life estate. The use of the words "in tail" in the *habendum* proves the intention—in *fact*—of the parties that, in the events which have happened, the estate should pass to the only child of the marriage. The fact that the draftsman blundered by using popular language incapable of conferring the estate cannot obscure the evidence of the intention, though—if we cannot rectify the deed—it may defeat the object of the instrument. It is admitted that if the intention had been declared in a recital, the omission of effective words of limitation from the operative part, or the use of wrong words therein, could be cured in the case of a marriage contract, or other contract for value.

Appeal.
1901.
FITZGERALD
v.
FITZGERALD.
Fitz Gibbon
I.J.

The contention that words occurring in the *habendum* are not evidence of the same intention which they would evidence if they were in a recital, has no intelligible foundation, and would limit the jurisdiction of equity to rectify deeds to cases where the blunder took the form of a contradiction between a recital and the *habendum*. For this restriction there is no authority. But here we also have the additional evidence of intention supplied by the marriage consideration, and by the other provisions to which I have referred. This supplies a technical answer to the appellant's contention as satisfactory as the substantial one which the *habendum* establishes beyond doubt.

In rectifying this deed, the Master of the Rolls has, in my opinion, exercised a jurisdiction to rectify mistakes which Courts of Equity have possessed from the earliest times, and which was exercised, under circumstances peculiarly like the present, by Lord Sugden in *Averall v. Wade* (1).

It is conceded that an order in the form which he has adopted is now the recognised mode of rectification, and that it is equivalent to an actual alteration of the deed.

WALKER, L.J. :—

I concur. I think the Court might well feel ashamed if it could not grant the relief sought. The venerable authorities cited by Mr. Ronan establish beyond all doubt what is the legal construction of this deed. But these authorities are not what we have to consider. They supply the reason why the plaintiff's advisers resorted to this action, which is brought not to construe but to rectify the deed. The parties here have said that the only child of the marriage—the plaintiff—shall take “in tail,” though the unhappy draftsman has failed to carry out their object by the terms he has used. Hence it is to the Court of Equity in which deeds are rectified that the plaintiff comes for help to remedy the draftsman's blunder.

In looking for the intention of the parties it is a powerful consideration that we are dealing with a marriage settlement, because the object of such a deed is to provide for the issue of the

(1) L.L. & G. temp. Sug. 252.

marriage, not to give merely a life estate to the children or an only child. Again, the estate which is given back to the settlor here is expressly limited to her "in default of issue" of the marriage. But powerful as these considerations are in gathering the intention of the parties to the deed, they fade to almost nothing beside the words in the *habendum*. If these words had occurred in a recital, it is not disputed that they would have been enough to correct a blunder in the operative part of the deed. I am unable to see why they should be less potent in the *habendum* than in a recital.

On these grounds I should be quite prepared, apart from authority, to rectify this deed by introducing words of limitation. But I find that a similar course was taken in *Bird's Trusts* (1), a decision of which I entirely approve.

HOLMES, L. J. :—

The jurisdiction of the Court of Chancery to rectify a deed or other instrument, for the purpose of correcting a material mistake and making it conform to the intention or contract of the parties, has been applied in this case by the Master of the Rolls to what is, perhaps, a new state of circumstances; but I think that it has not been extended beyond its legal and logical limits. The principle of rectification is, I think, in its strict sense only applicable, except under exceptional circumstances, to cases where there is valuable consideration and mutual mistake. Where mistake is shown in a voluntary deed, the appropriate remedy at least in most cases is for the grantor or settlor to have it set aside; and the mistake of one of the parties to a contract for valuable consideration is a ground for rescission, although the other party may be offered rectification as an alternative. Where, however, it is shown that a deed executed in pursuance of and for the purpose of carrying out a contract for valuable consideration fails in any substantial particular to do so, a party to it or a person within its consideration is entitled to have it brought into conformity with the contract; provided that subsequent rights and interests acquired in good faith by outsiders would not be prejudiced

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1901.
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v.
FITZGERALD.
Walker, L.J.

(1) 3 Ch. D. 214.

Appeal. thereby. Mere lapse of time is not in itself an answer to an
 1901. action for rectification, although it may make it more difficult to
 FITZGERALD prove mutual mistake. I take an illustration from the most
 v. common and usual kind of deed—a conveyance carrying out the
 FITZGERALD. purchase of lands This is generally preceded by either a formal
 Holmes, L.J. contract in writing, or the agreement can be ascertained from
 documentary evidence. Now, if by ignorance, or inadvertence,
 where the vendor has contracted to sell an estate in fee-simple, the
 lands are granted to the purchaser and his assigns, without any
 words of inheritance, the deed would be rectified upon proof of
 the true agreement and intention of the parties. Even if the
 mistake were discovered after the deaths of the grantor and
 grantee by the heir or devisee of the latter, it would not be too
 late for him to apply for relief. It may be, however, that there
 is no evidence of a written contract before the deed, and no
 account can be given of the transaction beyond a recital in the
 conveyance that the grantor had agreed in consideration of a
 certain sum then paid to grant the lands for an estate in fee-
 simple to the grantee. In this instance I should think that
 rectification would be as much a matter of course as in the other.
 But there may be yet a third case. By deed, executed before
 the Conveyancing Act, without a recital or any other evidence of
 the contract beyond the instrument itself, A B, in consideration
 of a large sum of money, grants lands to C D to hold for an
 estate in fee-simple. Would this be a case for rectification?
 Mr. Ronan would say no. The Master of the Rolls would, I
 think, be of opinion that it was, and I can see no good reason to
 the contrary. In this instance, just as clearly as in the two
 others, the contract and intention of the parties are shown.
 The only argument the other way is that by a rule of law a
 grant in the words suggested must be construed as giving a life
 estate only, and that the Court is not at liberty to infer from
 them any other intention. But to hold this would, I think, be to
 confuse two things that are distinct. By the rule of law the
 words “for an estate in fee-simple,” are not sufficient to convey an
 estate of inheritance, but why can they not be referred to for the
 purpose of seeing what was intended?

I admit that if I am wrong in what I have said, I should be

obliged to allow this appeal. We are here dealing with a marriage settlement, without knowing anything of the negotiations that preceded it. The instrument is one by which estates tail are frequently created; and therefore it does not violate probability to find an intention to give such an estate. But this does not bring one very far, for estates for life and estates in fee-simple are often given by a marriage settlement. There is, however, no difficulty in ascertaining the intention; for it is declared in the clearest language in the deed itself. The words "in tail" as applied to an estate are not merely a legal term of art but are familiar to educated men. When a man says that he is granting lands to a grantee in tail, it must be assumed that he is not intending to convey an estate for life or an estate in fee-simple, but the estate usually described in those terms. If those words were not there, I should be unable to infer the intention from any other parts of the deed; but with them, I am left in no doubt as to what were the contract and intention of the parties, and that such intention was not carried out by mistake arising from ignorance or carelessness. I am of opinion that, under these circumstances, the deed ought to be rectified.

Appeal.
1901.
FITZGERALD
v.
FITZGERALD.
Holmes, L.J.

Solicitor for the plaintiff: *J. A. French.*

Solicitors for the defendants: *O'Connell & Son.*

G. Y. D.

M. R.
1902.

STEWART v. KINGSALE.

March 5, 6, 7, 15. *Will—Trustees—Investment—Mortgage—Arrears of interest—Principal sum—Deficient security—Capital and income—Tenant for life and remainderman—Apportionment.*

Funds held under a will in trust for A for life, remainder for B for life, with remainder over for certain persons, were invested in 1875 on the security of a mortgage of real estate then of sufficient value. The interest due on the mortgage fell into arrear, and in 1880 a petition for sale and the appointment of a receiver was presented by the trustees of the will, and a receiver was appointed in the same year. In 1898 A (the first tenant for life) died. At her death considerable arrears of income were due to her, a portion of which was afterwards paid to her executors. In 1901 the lands subject to the mortgage were sold under the Land Purchase Acts, and did not realise the amount of the mortgage security. Prior to the sale nothing had been paid to B (the present tenant for life) in respect of interest:—

Held, that, under the circumstances, the date of the sale of the mortgaged lands must be taken to be the period at which the deficiency of the security was first ascertained; and that the sum realized by the sale should be apportioned, in proportion to the amounts due at that date, between the executors of the first tenant for life, the present tenant for life, and the trustees of the will, as representing the persons entitled to the *corpus* of the fund.

The principle of *In re Moore* (54 L. J. Ch. 432) preferred to that of *In re Foster* (45 Ch. D. 629).

UNDER the will of her father, Robert Smyth, dated 19th April, 1839, Dame Alicia Smyth became entitled as tenant for life to the rents and profits of certain real estate and the interest or income arising from a sum of £17,000 representing the residuary personal estate of the testator. This sum of £17,000 was secured with interest at 4½ per cent. by a mortgage of certain lands in the county Galway, the property of James and Francis Blake, created by indenture dated 1st July, 1875.

The interest on the mortgage debt having fallen into arrear, the trustees of the will of Robert Smyth, in the year 1880, presented a petition in the Land Judge's Court for the sale of the lands and the appointment of a receiver; and on the 8th September, 1880,

the order for sale was made absolute. A receiver was appointed by order dated November 4th, 1880. The Land Act of 1896 was passed before the lands were put up for sale and the estate came within section 40 of that Act. The request to the Land Commission by the Land Judge was issued on November 1st, 1898, and the report of the Land Commission was filed on 24th January, 1900. Dame Alicia Smyth (having married Sir L. Curzon, who took the name of Smyth) died on 13th July, 1898, whereupon, under the provisions of the will, Captain William Maxwell Smyth, a nephew of the testator, became entitled for his life to the income of the residuary personal estate.

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1902.
STEWART
v.
KINGSALE.

At the time of the death of Dame Alicia Smyth there was due to her estate for interest on the mortgage debt of £17,000 the sum of £1777 3s. The sum of £987 was subsequently paid by the receiver to the trustees of the will of Robert Smyth out of the rents of the lands on account of their mortgage debt, and was paid over by them to the executors of Dame Alicia Smyth, leaving a sum of £790 3s. due to her estate. The interest on the mortgage debt of £17,000 due to Captain William Maxwell Smyth as tenant for life from the 13th July, 1898, to 12th April, 1901, amounted to the sum of £2127 6s. 7d.

The mortgaged lands were ultimately sold to the tenants in occupation thereof, under the provisions of the Land Purchase (Ireland) Acts, and by order of the Land Judge, dated 24th April, 1901, a sum of £10,028 2s. 8d. guaranteed land stock (equivalent at the price of the day of transfer to a sum of £9351 3s 1d. sterling) was transferred to the trustees of the will of Robert Smyth, and a certificate was indorsed on the indenture of mortgage of 1st July, 1875, to the effect that £6530 4s. 4d. had been paid on account of the principal sum of £17,000, and the sum of £2820 18s. 9d. on account of interest.

Since 24th April, 1901, no money or stock was received by the trustees of the will on foot of the mortgage debt of £17,000 or the interest thereon. It was stated on affidavit that a further sum of £800, the proceeds of further sales, would shortly be transferred to the trustees, and that they would be entitled to have the unpaid balance due to them registered as a first charge against a sum of £6339 guaranteed land stock which the Irish Land Commission

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KINGSALE.

had retained as guarantee deposits in respect of advances made to some of the purchasing tenants. It was admitted that the amount realized would be quite insufficient to pay in full the principal sum of £17,000 and interest thereon.

James Blake, one of the mortgagors in the mortgage of 1st July, 1875, died in 1884, an undischarged bankrupt. It was stated on affidavit that Francis Blake, the other mortgagor, had no property available for payment if judgment were recovered against him on foot of his covenant for payment.

The trustees of the will of Robert Smyth issued an originating summons to obtain directions as to the respective rights of the several persons entitled under the will of the testator to the capital and income of the funds, representing the sum of £17,000.

The principal question arising for decision was, on what principle were the moneys recovered, or which might hereafter be recovered, on foot of the security to be divided between (1) the executors of the late tenant for life, (2) the present tenant for life, and (3) the several parties entitled in remainder under the trusts of the will of Robert Smyth, so that any deficiency that might ultimately result might be apportioned fairly between them.

Matheson, K.C., and *H. Cole Bowen*, for the trustees of the will of Robert Smyth, and the persons entitled in remainder:—

The first question in the case is whether the representatives of the deceased tenant for life are entitled to participate at all in the proceeds of the sale. The principle to be followed in all such cases is that neither tenant for life nor remainderman is to gain more advantage or to suffer more damage in proportion to his interest than the other does, owing to the deficiency of the security: *Cox v. Cox* (1). This rule is worked out satisfactorily in *In re Foster* (2). The effect of that decision is, that in cases similar to the present, in apportioning the loss the whole matter must be inquired into from the beginning. As between a tenant for life and those entitled in remainder the fund recovered is to be treated as the proceeds of the sale *plus* the interest actually received by the tenant for life. This total sum is to be divided between the tenant for life and the remaindermen

(1) L. R. 8 Eq. 343.

(2) 45 Ch. D. 629.

in the proportions of the amount to which each would have been respectively entitled if the security had not proved deficient. The tenant for life must give credit for the sum actually received.

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1902.

STEWART
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In re Foster (1) was followed by Farwell, J., in *In re Bird* (2). That case differs from the present only in the fact that the investment in that case was admittedly a breach of trust. The principle of apportionment of loss, however, is the same. *Lyon v. Mitchell* (3) does not follow *In re Foster* (1), and in *In re Barker* (4) it is suggested that the principle of apportionment adopted in *Foster's Case* (1) was intended to be confined to the case of a mortgagee in possession, but there seems no solid foundation for such a distinction. These two cases follow *In re Moore* (5), where in the case of the sale of a deficient mortgage security it was held that the sum realized must be apportioned between the tenant for life of the settled money and the persons entitled to it in remainder, in the proportions which the principal of the mortgage money (which belonged to the persons entitled in remainder) and the arrears of interest (which belonged to the tenant for life) bore to one another. But the real question argued in that case was whether the tenant for life was entitled to compound interest; and although *In re Moore* (5) was cited in argument in *In re Foster* (1), its principle was not followed by Kay, J. We contend here, following the rule in *In re Foster* (1), that the executors of the late tenant for life, if they claim participation in the moneys recovered by the realization of the estate, must give credit in full for all the interest which their testatrix actually received in her lifetime. If the principle is right that neither tenant for life nor remainderman is to suffer more than the other in respect of the deficient estate, the former cannot get payment in full up to the eleventh hour, and then come in and claim participation without accounting for the interest actually received. Here the executors of Dame Alicia Smyth can receive nothing, because the balance would be against them on the account, if taken on that principle. In *Ancketill's Estate* (6) the rule laid down in *In re Moore* (5) was adopted by Monroe, J.; but *In re Foster* (1) was not cited. The

(1) 45 Ch. D. 629.

(2) [1901] 1 Ch. 918.

(3) W. N. 1899, 27.

(4) W. N. 1897, 154.

(5) 54 L. J. Ch. 432.

(6) 27 L. R. Ir. 331.

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decision of Kekewich, J., in *In re Abston* (1) is not satisfactory. We cannot at present ask the Court to deal with the guaranteed land stock retained by the Land Commission by way of guarantee deposit, which cannot yet be regarded as realized or recovered.

Jellett, K.C., and *De Renzy*, for the executors of the will of Dame Alicia Smyth, the late tenant for life:—

The argument on behalf of the remaindermen, that the representatives of the deceased tenant for life are not entitled to share in the sum now recovered is contrary to the principle laid down by James, V.-C., in *Cox v. Cox* (2), that the tenant for life and the remainderman “must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund.” The argument of the other side entirely disregards the loss of one party (the first tenant for life), while taking into consideration the loss of the other two (the present tenant for life and those entitled in remainder). That is not the adjustment of rights on the principle that neither tenant for life nor remainderman is to gain advantage over the other. If the mode of apportionment contended for be adopted, the executors of Dame Alicia Smyth get nothing, because the interest actually received by their testatrix during her lifetime, would exceed the apportioned amount. The logical outcome of this principle would be that there must be a refund of any surplus actually received by the tenant for life over and above the proportion which she would have been entitled to receive under the suggested system of apportionment. But in *In re Bird* (3), Farwell, J., decided that there could be no refund ordered of any portion of income received by the tenant for life in that case in the absence of any responsibility on her part in respect of a breach of trust. In *Bird's Case* (3) an effort was made to restore the *status quo ante* the breach of trust. The decision rests on the fact that there was a wrongful investment made by the trustee of the settled funds, which resulted in a partial loss of income and capital. Speaking of the principle of *In re Foster* (4), Farwell, J., says:—“Whether this is a proper

(1) [1901] 2 Ch. 584.

(2) L. R. 8 Eq. 343.

(3) [1901] 1 Ch. 916.

(4) 45 Ch. D. 629.

mode of apportionment in a case where the loss has not arisen from a breach of trust is not for me to determine."

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There are no materials enabling the Court to say that at any particular point of time before the sale, the deficiency of the security was ascertained. The money paid to the deceased tenant for life was rightfully paid, and it cannot now be said to her representatives, "You must give credit for what has been received, in order to see what you are now entitled to," The rational principle is that adopted in *In re Moore* (1). That is, "Take the amount due for capital and the amount due to the tenant for life for arrears of interest, and then apportion the sum recovered accordingly." The inquiry in this case is, what is due to the deceased tenant for life, what is due to the present tenant for life, and what is due to those entitled in remainder, at the date of the realization of the deficient security? *In re Moore* (1) has been followed four times, viz.: *Lyon v. Mitchell* (2); *In re Barker* (3); *In re Alston* (4); and *Ancketill's Estate* (5). *Foster's Case* (6), on the other hand, has been dissented from three times. As Kekewich, J., points out in *In re Alston* (4), the explanation of that decision may be that it is only to be applied in the peculiar circumstances of the case. It would seem that such principle of apportionment should be confined to the case of a mortgagee in possession. See *In re Barker* (3). At any rate the principle of the decision in *In re Moore* (1) is preferable, and is logically sound.

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See also *Turner v. Newport* (7).

O'Connor, K. C., and *A. W. Murray*, for Captain William Maxwell Smyth, the present tenant for life:—

The true principle of apportionment is that adopted in *In re Foster* (6), which is not overruled by *In re Alston* (4). In the latter case Kekewich, J., decides that it did not apply to the circumstances in the case before him. In the case put forward by the executors of Dame Alicia Smyth, there is neither equality nor

(1) 54 L. J. Ch. 432.

(2) W. N. 1899, 27.

(3) W. N. 1897, 154.

(4) [1901] 2 Ch. 584.

(5) 27 L. R. Ir. 331.

(6) 45 Ch. D. 629.

(7) 2 Ph. 14.

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equity. They make a claim against the *corpus* of the trust fund. The *corpus* has been already appropriated in part for payment of interest to Dame Alicia Smyth, in her lifetime, and to her executors since her death. Her representatives, when seeking equity, must do equity. They are not bound to refund, but they must bring what they have received into hotchpot before they can make any further claim against the proceeds of the common security. The principle of *Foster's Case* (1) is applied every day in this Court. If a testator leaves three legacies of £100 to three persons, and one has received £50 as a share of his legacy, he is not entitled to prove against the fund under the control of the Court until he accounts for what he has received. It is no part of the principle of *Foster's Case* (1) that there should be a refund. If the deceased tenant for life received more than what she would have been fairly entitled to on account, that was her good fortune. The true principle of distribution is, that if there is a sum of money in Court for distribution, the Court will do full justice between the claimants, and will adjust the loss, so far as loss has been incurred, according to the strict rights of the parties. That is the principle of *Cox v. Cox* (2). In that case the actual decision was this—An obligor covenanted and became bound to pay three months after his decease a fund to trustees upon trust for a tenant for life and remainderman, with interest from date of his death till payment. Several years after the obligor's death assets were recovered, which were insufficient to fulfil the covenant and bond. It was held that a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, and the difference paid to the tenant for life. There the death of the obligor was taken to be the date of realization; and this mode of apportionment between capital and income was followed in *In re Earl of Chesterfield's Trusts* (3). *Teague v. Fox* (4) is another application of that mode of calculation. See also *Ancketill's Estate* (5) and *Gow v. Foster* (6).

(1) 45 Ch. D. 629.

(2) L. R. 8 Eq. 343.

(3) 24 Ch. D. 643.

(4) [1893] 1 Ch. 292.

(5) 27 L. R. Ir. 331.

(6) 26 Ch. D. 672.

In this case the date of sale is not the date of realization. The appointment of a receiver in 1880 was a realization by the Court. *Anketill's Estate* (1) really shows that receipt of rents by a receiver is a realization by the Court. The security was then ascertained to be deficient, since there must at that date have been one year's arrears of interest due at least. At all events, at the date of the death of Dame Alicia Smyth the security was clearly ascertained to be deficient, inasmuch as, notwithstanding the fact of the receivership, the interest payable to her was two years in arrear. We are entitled to make the executors of the deceased tenant for life account, at least, from the date of her death, if not from the appointment of the receiver.

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The calculation of what is capital and what is interest must be made as from one of those dates and the moneys apportioned between the representatives of the late tenant for life, the present tenant for life, and the persons entitled in remainder, on the basis of the decision in *In re Foster* (2).

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The recognised principle is that laid down by Vice-Chancellor James in *Cox v. Cox* (3). He says, at p. 344 of the report: "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund."

In that case the tenant for life had received nothing out of the investment, so that the question arose in its simplest form, uncomplicated by what I have to determine here, viz. how are the rights to be adjusted when the tenant for life has received interest for a part of the period during which it was payable?

Turner v. Newport (4), a decision of Lord Cottenham, was not cited to Lord Romilly in *Re Grabowski* (5); and, though the facts

(1) 27 L. R. Ir. 331.

(4) 2 Ph. 14.

(2) 45 Ch. D. 629.

(5) L. R. 6 Eq. 12.

(3) L. R. 8 Eq. 343.

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are different and somewhat more complicated, entirely supports the principle of Vice-Chancellor James' conclusion in *Cox v. Cox* (1). Lord Cottenham says:—"This case, though certainly peculiar in its circumstances, appears to me to be governed by one of the most ordinary principles in the administration of assets. A portion of the testatrix's estate consisted of a debt. The debtor's estate was insolvent, and, for several years after the death of the testatrix, nothing was recovered, either in the shape of principal or interest. At length a sum is realized; and then, when the question arises what part of it is, as between the parties, to be considered as principal, the tenant for life is told, that, because the gross sum recovered is less than the amount of the original debt, she is to have nothing. Such a proposition is contrary to the plainest principles of justice, particularly when it is considered that the Court itself has restrained her from getting in the debt sooner, in the hope that more might be ultimately recovered. But the other proposition is equally untenable—that she is entitled to the whole of what has been recovered in respect of interest since the testatrix's death. For, besides that there is nothing in the will to entitle the tenant for life to the interest of the residue in its actual state of investment at the death of the testatrix, the circumstances of the estate out of which this debt was to be paid may have been such as to make such a proposition doubly unfair towards the parties interested in the capital. Suppose, for instance, that if, while interest was accruing upon the debts, the fund for payment of them was producing no interest at all, or a lower rate of interest, it is obvious that the longer the recovery of the debts was protracted, the more those parties would be prejudiced; for the proportion of the fund which would be ultimately attributable to the capital of the debts would be continually diminishing. I think, therefore, that the proper course is that suggested by Mr. Parry, viz. to ascertain what the bond would have realized if the debtor's estate had been administered at the expiration of a year after the testatrix's death, and to allow the tenant for life interest at 4 per cent. on that amount."

Innes v. Mitchell (2), decided by Lord Lyndhurst, and in

(1) L. R. 8 Eq. 343.

(2) 1 Ph. 710.

substance afterwards adopted with variation by Lord Cottenham, appears to have been argued before, and decided some time after *Turner v. Newport* (1), although reported in the preceding volume of Phillips. In some respects it bears a close resemblance to that now before me.

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In that case William Innes, by his will, gave to his three natural daughters, Ann, Sophia, and Heriot, the yearly sum of £300 among them, and to the longest liver; and he directed that "a sufficient sum should be invested in the public funds in the names of his executors as trustees for the three sisters, who were to divide the £300 equally between them while all of them were alive, and to the longest liver of them the whole." By a codicil the testator gave and bequeathed "the £300 a year to be equally divided between the sisters during their lives, and to the longest liver, when the stock which produces that sum may then be sold for the use of such longest liver and her heirs." He appointed his three daughters residuary legatees. After the death of the testator a sum of stock was set apart by the executors to answer the annuity of £300. The annuity was regularly paid to the three daughters until 1800, when Sophia died, after which it was regularly paid in equal moieties to the two survivors until 1816, when the surviving executor of the will died insolvent, having sold out the stock which had been set apart to answer the annuities, in consequence of which, there being then no other part of the testator's estate available for the payment of the annuities, they ceased to be paid. After the deaths of the other two daughters of testator, a sum of money, forming part of his residuary estate, but of less amount than the original fund set apart, became available. It was held that this sum was to be apportioned rateably between the arrears due to the two surviving daughters respectively at the time of the death of that one of them who died first, and the sum originally set apart, and which belonged to the last survivor. Thus, the estate of the first of the three sisters who died is left out of account, because she was paid all she was entitled to up to her death in 1800.

The second to die was Heriot (Stewart). She lived till 1837; but her annuity was not paid after 1816, so that £3150 for twenty-

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one years' arrears was then due to her estate. She had, however, received £150 each year from 1800 till 1816, making, I suppose, £2400 or thereabouts.

The last to die was Mrs. Mitchell (Ann), and the arrears due to her were stated to be upwards of £5000; but this must have included a claim to arrears after Mrs. Stewart's death, a claim which was not in the first instance allowed, because on Mrs. Stewart's death Ann Mitchell became entitled under the will to the principal fund, though in another view she might have claimed the whole annuity instead. It was in this latter particular that Lord Cottenham varied the decree of his predecessor.

The point to be observed is that it never occurred to Lord Lyndhurst, or apparently to Lord Cottenham, to take into account the payments of the annuities regularly made down to 1816. The arrears only are dealt with.

So much for the older cases.

More recently the same question has been considered several times, notably in *Re Grabowski* (1); *Cox v. Cox* (2); *Re Moore* (3); *Re Foster* (4), and some later cases.

Re Grabowski (1868) (1) may be briefly dismissed, as it has been overruled, or at least has never been followed or applied, and is inconsistent with all the other cases on the subject. Lord Romilly, M.R., there held that the whole of the fund recovered should go to replace capital, regardless of the arrears of interest; but this view was manifestly wrong.

Cox v. Cox (1869) (2) in effect overruled *Re Grabowski* (1). In *Cox v. Cox* (2) by marriage settlement George Cox covenanted to pay to trustees, three months after his death, the sum of £6000, with interest from date of death till payment at 5 per cent. He also executed his bond conditioned to be void on payment of like amount with interest. The trusts of the money by the settlement were declared to be for the widow for life, with remainder (in the events that happened) for the benefit of the children of the marriage. Some years after Mr. Cox's death assets were recovered which were insufficient to fulfil the covenant and bond. It was held that a calculation must be made of what principal, if invested at the date

(1) L. R. 6 Eq. 12.

(3) 54 L. J. Ch. 432.

(2) L. R. 8 Eq. 343.

(4) 45 Ch. D. 629.

of the obligor's death at 4 per cent. interest, would amount, with interest to the fund recovered. Interest at 4 per cent. on this principal was to go to the tenant for life, and the rest was to be treated as capital. In that case the tenant for life had not received anything, so that no question of giving credits arose, save as far as it may be involved in the statement of the principle on which Sir W. M. James proceeded, as embodied in the language I have already quoted; and that language is, on this point, ambiguous, since the rights of the tenant for life under the settlement may mean either his rights as from the date of the settlement, or his rights as existing when the loss of capital occurred.

In *Re Moore* (1885) (1), decided by Pearson, J., it was held that the fund realized was divisible between tenant for life and remainderman in the proportions in which the arrears of interest bore to the entire original principal money, without allowing interest on either. This in effect follows *Cox v. Cox* (2) unless the words used in the latter case are construed to apply to the whole original interest under the settlement.

Then comes *Re Foster* (1890) (3), in which Mr. Justice Kay referred to *Maclaren v. Stainton* (4), and *Re Tinkler's Estate* (5), neither of which greatly affects the present question, and then proceeded to enunciate a new rule or formula, materially different from anything to be discovered in the earlier decisions. In that case Thomas Foster, by will, gave his residuary estate to trustees upon trust for sale and to pay the income of the proceeds to his widow for life, with remainder to certain persons absolutely. After Mr. Foster's death, the trustees invested £7535, part of the residuary estate, on mortgage of freehold property at 5 per cent. The trustees afterwards entered into possession of the mortgaged property and paid the rents to the widow, as tenant for life until her death, but such rents were insufficient to keep down the interest; the total deficiency of interest at the date of the widow's death amounting to £3400. Shortly after her death the trustees sold the mortgaged property. The sale realized £7005 only, being less than the principal mortgage money. In

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(1) 54 L. J. Ch. 432.

(2) L. R. 8 Eq. 343.

(3) 45 Ch. D. 629.

(4) L. R. 11 Eq. 382.

(5) L. R. 20 Eq. 456.

M. R. giving judgment Kay, J., said:—"I am of opinion that the
 1902. available fund should be apportioned between the tenant for life
 STEWART and the remaindermen, upon the basis of the following calculation.
 v. KINGSALE. Treat the capital moneys which have been produced by the sale
 and all the moneys received by the tenant for life as the fund
 recovered from the mortgagees. Add them together. Then
 divide the total sum in this way: Estimate how much the tenant
 for life would have received if the mortgage interest had been
 regularly paid, deducting income tax. Then take the capital
 sum which the remaindermen would be entitled to on the suppo-
 sition that the capital of the mortgage debt had been fully paid.
 Then divide the total between the tenant for life and the
 remaindermen in the proportion of these two amounts which
 each ought to have received; and in making that division the
 tenant for life should give credit for what she has actually
 received. If the sale did not take place until a little while after
 her death, then the remainderman ought to be credited with interest
 during that time. For the purpose of calculation they are entitled
 to receive the whole amount, together with interest at 5 per cent.
 per annum from the death of the tenant for life. This would be a
 little addition to the sum which the remaindermen ought to receive.
 Then it will be the sum actually recovered by the tenant for life
 and the remaindermen. The total will be divisible between them
 —the remaindermen and the tenant for life—each taking that pro-
 portion. The tenant for life must give credit for what she has
 actually received." It will be observed that the learned Judge
 does not profess to give any authority for adopting this basis of
 calculation, nor any reason why it should be adopted in lieu of
 that previously existing, but leaves it to stand or fall on its own
 inherent merits. *Cox v. Cox* (1) and *Re Moore* (2) were however
 both cited in argument. *Re Foster* (3) was followed with possibly
 a modification by Farwell, J., in *Re Bird* (4). In that case
 Farwell, J., says:—"The question I have to answer is, how the
 loss caused by the breach of trust is to be borne. The authorities
 are in a perplexing condition, and I am unable to reconcile the
 decision of Pearson, J., in *In re Moore* (2) with that of Kay, J., in

(1) L. R. 8 Eq. 343.

(3) 45 Ch. D. 629.

(2) 54 L. J. Ch. 432.

(4) [1901] 1 Ch. 916.

In re Foster (1). The present case is distinguishable from both those authorities, as in neither of them was the loss caused by a breach of trust." He then quotes the principle stated by James, V.-C., in *Cox v. Cox* (2), and says: "Applying this principle, I have first to ascertain what the fund for division ought to be on the assumption that the sale and wrongful investment never took place. In that case there would have been £10,021 Consols for division, and the tenant for life would have received the interest on those Consols down to her death. As a matter of fact, she received altogether the sum of £4066 in respect of the income of the wrongful investment. She was in no way responsible for, or indeed cognizant of, the breach of trust, and I could not order her executor to refund any portion of this income. But I am dealing with a case of adjustment of a loss as between tenant for life and remainderman, and so long as any funds are available for that purpose I must so apportion them as to throw the loss on income and capital rateably. The proper method of doing this is to ascertain the total amount of the dividends on £10,021 Consols that the tenant for life would have received if the sale and wrongful investment had not been made, and also to ascertain the value of £10,021 Consols at her death, the proper time for distributing the fund. This will show the amounts that ought to have been available for income and capital respectively. On the other hand, the fund in Court, *plus* the £4066 income actually received, *minus* accretions since the death of the tenant for life, which accretions belong to the remainderman, gives the aggregate amount actually produced by the wrongful investment up to the death of the tenant for life.

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"In order to throw the loss on income and capital rateably, this aggregate must be divided between the estate of the tenant for life and the remainderman, according to the rule in *In re Foster* (1), *i.e.* in the proportion which the total amount of dividends that the tenant for life would have received on the £10,021 Consols from the date of the wrongful investment to her death, bears to the value of £10,021 Consols at her death, her executor giving credit for the £4066 actually received, but

(1) 45 Ch. D. 629

(2) L. R. 8 Eq. 343.

M. R. not being liable to refund any over payment for the reason
1902. above stated.

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When the learned Judge explains that the actual decision does not extend beyond cases of breach of trust, he does not suggest any reason why it should not, if correct, apply to all cases of loss of trust funds, and I confess I do not see any reason founded upon principle why it should be so restricted. In *In re Foster* (1) there was no breach of trust; at least, none is mentioned or suggested in the report.

In two other cases, of which only brief notices are to be found in the *Weekly Notes*, and there only, *Re Barker* (2) and *Lyon v. Mitchell* (3), Stirling, J., and North, J., respectively followed *Re Moore* (4), and not *Re Foster* (1); and in the last case on the subject, *Re Alston* (5), Kekewich, J., in a reasoned judgment followed *Re Moore* (4). He says (p. 589 of the report):—“A sum has been realized which is not sufficient to pay the principal and arrears of interest. The result is that it must be ascertained in some way what is the fair division between those who are entitled to interest and have not received it in full, and those who are entitled to the capital and will not receive it in full. It seems to me that the simplest and most logical way of dealing with that is to apportion the amount which you have actually got between the two estates which are beneficially interested in that amount—the estate of the tenant for life, or successive tenants for life, as in this case, on the one hand, and the estate of the remainderman on the other hand. The real question is what is due to each at the time of the realization. Of course, if a tenant for life has received money he must give credit for that; but what you have to ascertain is what is due at the date you recover the money. That view, as I understand it, agrees with the decision of

(1) 45 Ch. D. 629.

(2) W. N. 1897, 154.

(3) W. N. 1899, 27.

(4) 54 L. J. Ch. 432.

(5) [1901] 2 Ch. 584.

Pearson, J., in *In re Moore* (1). It does depart from the decision of Kay, J., in *In re Foster* (2), but the explanation of that decision may be that it is one only to be applied to the peculiar circumstances, and in the case of *In re Barker* (3), Stirling, J., appears to have intimated an opinion that the apportionment in *In re Foster* (2) was intended to be confined to the case of a mortgagee in possession. That distinction does not altogether commend itself to my mind. In the present case the amount which has been recovered must be apportioned between capital and income in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal. As between the successive tenants for life, the amount attributed to interest will be apportioned in proportion to the arrears due to them respectively."

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The authorities are therefore, it must be confessed, in a somewhat confused state. I should, perhaps, also mention *Ancketill's Estate* (4) in this country, in which Monroe, J., followed *Re Moore* (1); but *Re Foster* (2) was not cited, and, perhaps, from the dates may not have been reported at the time, nor was the precise question here involved discussed.

Conceiving myself, therefore, to be at liberty to act as may seem most just in the matter, I have to decide between *Re Moore* (1), and *Re Foster* (2); and I unhesitatingly prefer the former.

A tenant for life of a fund which becomes diminished by means of a breach of trust (to which he is not a party), or by the bankruptcy of a debtor, or by fall in value of the securities on which the trust money is invested, may have received the income of the fund before any such calamity for a long series of years. The amount of income so enjoyed may equal or largely exceed any sum which would be coming to him, on any equitable calculation, out of the remnant of the fund. In either case he will, under the decision of *Re Foster* (2), receive nothing. Yet the payment of the income which has been received by him has in no way caused the loss or diminished the fund to which the remainderman is entitled. The diminution is caused by an act which wrongs both

(1) 54 L. J. Ch. 432.

(2) 45 Ch. D. 629.

(3) W. N. 1897, 154.

(4) 27 L. R. Ir. 331.

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remainderman and tenant for life as from its date. Before its occurrence the income received was rightfully received. Each payment of income or interest belonged to the tenant for life. If withheld, he could have enforced each and every payment by regular process of law; and in no conceivable event could it be recovered back from him in the absence of fraud or the like.

Further, the calculation adopted in *Re Foster* (1) is incapable of being applied in all cases so as always to carry out the principle it was designed to effectuate. Admittedly, payments of income regularly made before the loss cannot be recalled. Some of the cases state this in terms, and it is clear that it must be so, once it is shown that the payments were at the time in accordance with the trust.

Take, then, the case in which the tenant for life has received more than would be his on the principle of bringing past payments into the account. The remainderman then will receive less, it may be much less, than the calculation would give him, while the life tenant has had more, it may be much more, than his share.

In truth, the equity alleged is a halting and uncertain one, and in my opinion there is no solid basis for it. Even if in the case last put the excess of receipts by the tenant for life could be charged upon his interest in the future income of the diminished fund, that would be a precarious expedient, and would not ensure equality in the way equality is sought to be produced. But indeed I can find no sufficient reason for the practice. The rule in *Re Moore* (2) ensures to those interested in the trust fund equality of treatment in respect of the rights and interests injuriously affected by the loss which diminishes the fund. But the loss of the fund ought only to affect injuriously the interests of those entitled to it as from the date of the loss. This must be the case where the loss is total. Why then should there be a difference when the loss is partial only I fail to see. Thus the date of the breach of trust, bankruptcy, or decline of securities, or the time at which it becomes apparent that there must be a loss (*Ancketill's Estate* (3)) is, in my opinion, the time at which persons entitled in succession are injured; and the adjustment as between them

(1) 45 Ch. D. 629.

(2) 54 L. J. Ch. 432.

(3) 27 L. R. Ir. 331.

should commence and take effect as of that date; and this is, I conceive, the correct interpretation of what was said in *Cox v. Cox* (1).

In the present case I cannot see any other date to which this consequence is to be attached than the date of the sale. For all that appears, although the interest had partly fallen into arrear, the trust fund and interest on it might have been adequately secured all along till the sale.

Part of the proceeds of sale consists of guaranteed deposit of land stock retained to meet possible defaults of the purchasers. Till that is set free it cannot be dealt with in possession, so far as *corpus* is concerned, at present, for it may never be realized, though there is little doubt that it will. When it is set free it will be subject to the same principle; but the dividends of the stock in the meantime will belong to those persons interested in the capital and arrears, including, of course, the tenant for life.

Solicitor for the trustees of the will of Robert Smyth: *H. F. Martley.*

Solicitors for the executors of Dame Alicia Smyth: *Rooke & Rooke.*

Solicitor for Captain William Maxwell Smyth: *H. F. Martley.*

R. W. L.

(1) L. R. 8 Eq. 343.

M. R.
1902.
STEWART
v.
KINGSALE.

Appeal.
1901.

Nov. 19, 20.
Dec. 11.

TEVLIN v. GILSENAN (1).

(1901. No. 110.)

Mortgage—Judgment mortgage—Judgment against one of the next-of-kin of an intestate—Registration as mortgage against interest in intestate's chattel real—13 & 14 Vict. c. 29.

A judgment debtor, being one of the next-of-kin of a deceased intestate, has an interest in a chattel real belonging to the intestate of such a specific character that it can be affected by the registration of the judgment as a mortgage against it.

APPEAL by the plaintiff against the decision of the Right Hon. the Vice-Chancellor, pronounced on June 4th, 1901, reported [1901] 1 I. R. 429, where the facts are stated.

Ignatius T. O'Brien, K.C., and W. H. Brown (with them J. Morgan Byrne), for the appellant.

The Right Hon. C. H. Hemphill, K.C., and P. A. O'C. White, for the respondents.

[The following cases were cited : *Hamill v. Murphy* (2) ; *Carolan and Scott's Contract* (3) ; *Tench v. Glennon* (4) ; *Cooper v. Cooper* (5) ; *Holland v. Chambers* (6) ; *Gormley v. Buchanan* (7) ; *Sweeney v. Gallagher* (8) ; *Turner v. Rennoldson* (9) ; *Mullane v. Ahern* (10) ; *Rosborough v. M'Neill* (11) ; *In re Blake's Estate* (12) ; *M'Auley v. Clarendon* (13) ; *Whitworth v. Gaugain* (14) ; *Webb v.*

(1) Before LORD O'BRIEN, L.C.J.,
and FITZGIBBON and HOLMES, L.JJ.

(2) 12 L. R. Ir. 400.

(3) [1899] 1 I. R. 1.

(4) 34 I. L. T. R. 157.

(5) L. R. 7 H. L. 53.

(6) [1894] 2 I. R. 285.

(7) *Ibid.* 299.

(8) 22 Ir. L. T. R. 82.

(9) L. R. 16 Eq. 37.

(10) 28 L. R. Ir. 105.

(11) 23 L. R. Ir. 409.

(12) [1895] 1 I. R. 468.

(13) 8 Ir. Ch. Rep. 568.

(14) 1 Phillips, 728.

Jones (1); *Bradley v. Flood* (2); *Herbert v. Rea* (3); *Caulfield v. Walshe* (4); *In re Rae's Estate* (5); *Anglo-Italian Bank v. Davies* (6); *Irish Land Commission v. Davies* (7); *Eyre v. M'Dowell* (8); *Dunster v. Lord Glengall* (9); *Reidy v. Pierce* (10); *Quirke's Estate* (11); *Scanlan's Estate* (12); *Thomas v. Cross* (13); *Lord Sudeley v. Attorney-General* (14); *Sugden's Vendors and Purchasers* (14th Ed.), pp. 522-525.]

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The case having been re-argued by one counsel on each side on this date, Dec. 11.

LORD O'BRIEN, L.C.J. :—

The question in this case is, whether one of the next-of-kin of a deceased person has an interest in a chattel real belonging to the intestate of such a specific character that it can be affected by the registration of a judgment as a mortgage against it. In *Herbert v. Rea* (3) it was decided that one of the next-of-kin of a deceased tenant, notwithstanding that he was a defendant in the ejectment proceedings, had not "a specific interest" in a chattel real which had been evicted for non-payment of rent, so as to enable him to redeem it on payment of the rent and costs. That case created a great discussion at the time it was decided amongst the members of the Bar. The Lord Chief Baron gave the reasons which led to the judgment of the Court, which was composed of Baron Fitzgerald and Baron Dowse, as well as of the Chief Baron. The actual question in this case came before the learned Vice-Chancellor on a previous occasion in *Re Carolan and Scott's Contract* (15), and he then took the view adopted by the Chief Baron in *Herbert v. Rea* (3), that the next-of-kin had not a specific interest in the chattel real of the intestate, and he held, therefore, that a judgment mortgage could not be validly registered against the interest

(1) Unreported; cited 2 Dan. Ch. Pr. (5th ed.), p. 1071.

(2) 16 Ir. Ch. R. 236.

(3) 1 R. 9 C. L. 539.

(4) 1 R. 2 C. L. 492.

(5) 1 L. R. Ir. 174.

(6) 9 Ch. D. 275.

(7) 27 L. R. Ir. 334.

(8) 9 H. L. Cas. 619.

(9) 3 I. Ch. R. 47.

(10) 11 I. C. L. R. 361.

(11) 3 L. R. Ir. 23.

(12) [1897] 1 I. R. 462.

(13) 2 Dr. & Sm. 423.

(14) [1897] A. C. 11.

(15) [1899] 1 I. R. 1.

Appeal. of a next-of-kin entitled to a share of a chattel real. The very
 1901. same question arose on the hearing of a civil bill appeal before
TEVLIN the Lord Chief Baron in *Tench v. Glennon* (1). The learned
v. Judge took time to consider his decision, and notwithstanding his
GILSENAN. own earlier judgment in *Herbert v. Rea* (2), he held that a next-
 Lord O'Brien, of-kin has a specific interest in the chattel real of an intestate, and
 L.C.J. therefore that a judgment mortgage can be validly registered
 against such an interest. The Lord Chief Baron had before
 him the report of the Vice-Chancellor's judgment in *Re Carolan*
and Scott's Contract (3), but he declined to follow it on the ground
 that it was distinctly opposed to the case of *Cooper v. Cooper* (4)
 in the House of Lords, and to the registration cases in this country,
 in which, following *Cooper v. Cooper* (4), this Court held that the
 next-of-kin of a deceased tenant who had died intestate was
 entitled to a specific interest in his holding. Lastly, the question
 arose—again before the Vice-Chancellor—in the present case.
 The learned Judge followed his previous decision in *Re Carolan*
and Scott's Contract (3), holding that *Cooper v. Cooper* (4) was
 distinguishable, and laying down in so many words that a next-
 of-kin has not a specific interest in an intestate's chattel real—
 that all his interest is a mere right to have the estate administered
 and to get what may come to him as his share. This decision is
 now on appeal before us.

It is essential for us, first, to see what was decided by *Cooper v. Cooper* (4). A testator directed certain real estate to be converted and to be held in trust as personal estate, subject to his wife's life interest therein, for his children in such shares as his wife should by deed or will before the children attained twenty-five appoint. The testator left three children, and by a deed executed before any of the children attained twenty-five the widow appointed the property in equal shares amongst the three children, reserving to herself a power of revocation. One of the children married, had two children, and then died intestate, leaving his two children his next-of-kin. The widow of the testator subsequently to the date of the deed of appointment made a will with several codicils thereto, the effect of which was to dispose of the converted real estate in

(1) 34 I. L. T. R. 157.

(2) I. R. 9 C. L. 539.

(3) [1899] 1 I. R. 1.

(4) L. R. 7 H. L. 53.

a different manner from that adopted in the deed of appointment, and also to confer benefits on the children of the deceased son. It was decided, in an action brought to try the question, that the will which did not take effect until the death of the testatrix, which occurred after the prescribed period during which she had power to appoint, could not operate as an appointment under the power, and that therefore the converted real estate belonged in thirds to the two surviving children of the testator and the two children next-of-kin of the deceased child. The child of the testator, in whose favour the property was appointed by the will, then brought a suit to put the other child and the children of his deceased brother to elect between their claims under the deed of appointment and under the will and codicils of the testator's widow. The question which the House of Lords had to decide was whether the two children, the next-of-kin of the deceased brother, were bound thus to elect. The argument of the case on behalf of these two children, who were the appellants, is very fully given in the report, and is most important as showing what was decided in the case. Counsel for the appellants argued that (p. 57) :—

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“The interest of a next-of-kin in the personal estate of an intestate is an undefined and intangible interest : it is a right merely to have the estate converted into money, in that respect resembling that of a residuary legatee, as to whom, in *Lady Cavan v. Pultney* (2 Ves. Jun. 544), it is said ‘that a residuary legatee is entitled only to what remains after the debts are discharged.’ It is not something definite and ascertained which can be set against a clear gift of a specific benefit under a will.”

Nothing can be clearer than that. It is the very argument which has been adopted by the Vice-Chancellor in the present case in his judgment, and which has been so forcibly put forward on behalf of the respondent by Mr. Hemphill. Now see how the case was presented on the other side. For the respondents it was argued (p. 62) :—

“The interest of the appellants, in respect of their claim as next-of-kin of their father, to share in the proceeds of the sale of Pain's Hill Estate, is a clear, definite, and tangible interest. It is not properly described as a contingent interest coming to the next-of-kin only after other interests and other rights have been satisfied, and dependent

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therefore on them. The title to it vested in them absolutely on the death of their father, though the profitable enjoyment of it might be postponed. It came to them by operation of law as directly and distinctly as it could have come under the plain and absolute words of a will. They stood in the same situation as residuary legatees, and as these may, in fact, gain nothing, because debts may absorb the whole estate, so next-of-kin may equally and from the same cause obtain no benefit. But their legal title to the property is the same."

Thus we have the arguments on both sides presented almost in the same way as counsel for appellant and respondent have put forward their respective contentions before us. The case was at argument on three days, and on the third day, at the conclusion of the appellants' reply, the House of Lords gave its decision. The Lord Chancellor (Lord Cairns) states that the very point at issue had been the subject of an argument of an exhaustive character. He says (p. 64):—

"My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the Bar from the counsel for the appellants, that the interest of a next-of-kin in the estate of an intestate is an undefined and intangible interest; that it is a right merely to have the estate converted into money, and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next-of-kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors, and for the facility of division. For the benefit of creditors, and for the facility of division amongst the next-of-kin, the estate is to be turned into money; but as regards substantial proprietorship, the right of the next-of-kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors."

That is the opinion of Lord Cairns on a point which it was essential that he should decide in the case, deliberately pronounced after an elaborate argument on both sides. The Lord Chancellor then proceeds to show that this right of the next-of-kin is well expressed in a book of high authority—Bacon's Abridgment (Tit.

Exors. and Admors. I. s. 4, vol. iii., p. 506)—from which he cites the following passage :—

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“It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors. Also, this statute, being in the nature of a will for all persons who die intestate, ought, in this instance, to be resembled to the case of a residuary legatee, in which it is always holden that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, etc., which remains over, and not the executor of the first testator.”

Further on the Lord Chancellor distinguishes between the rights of a creditor of the intestate and those of one of his next-of-kin. He says (p. 66) :—

“Can any person doubt but that one of these next-of-kin might, before the administration of the estate of the intestate, have released to another next-of-kin, or have assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that a next-of-kin could take that course. But, my Lords, could a creditor do so? Could a creditor, before payment of his debt, say, ‘I will release to you, or, I will assign to you, my interest in such an item of the estate of the intestate’? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate.”

Thus we see the Lord Chancellor states it as a matter beyond all doubt or question that a next-of-kin can release or assign his interest in any specific item of the estate of the intestate.

Now, one passage more from the judgment of the Lord Chancellor, which shows beyond doubt that he treated the words I have just read as essential to his decision (p. 67) :—

“My Lords, that disposes, I think, if your Lordships take that view, of the main question which was argued at the Bar. The two children, who are two of the next-of-kin of the second brother (their

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father), take benefits under the will; they also take, in substance, an interest in an aliquot share of the proceeds of the sale of the Pain's Hill Estate as next-of-kin of their father, and they must elect between their interest which would be in opposition to the will."

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Lord Hatherley entirely concurs in the view taken by the Lord Chancellor. He expressly refers to the way the case was argued, saying (p. 71):—

"But then comes the argument, which was exceedingly ably and forcibly put by Mr. Dickinson in the course of the discussion of this case, namely, that that which these appellants take is not a distinct interest, is not the thing given by the testatrix, but is simply a right to have that thing, together with the other assets of the testator, disposed of by the administrator, and applied to the payment of the debts of the intestate; and when those debts are paid and satisfied, then the balance (the balance only, and not this matter in specie) comes to the person now called on to elect."

There could be no clearer statement of the argument put forward by the appellants in *Cooper v. Cooper* (1), and repeated by the respondent before us. But see how Lord Hatherley deals with the point so argued. He goes on (p. 71):—

"I think the noble and learned Lord on the woolsack has so fully met and disposed of that argument that it would be waste of your Lordships' time for me to pursue it farther. I may be permitted, perhaps, to add another illustration (which is, in truth, only another way of saying the same thing) to that which the noble and learned Lord offered, namely, that—in addition to the argument, founded on the clear power of these persons interested in the testatrix's estate, to release their interest and right in this specific property, which has come to them in consequence of their rights under the will of the original testator—there is a distinction between them and a creditor in this respect, that whereas a creditor could by no circumstance, and by no course taken by him, ever acquire a distinct interest in that particular chattel which is now in question—yet I take it that, whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there were a sole next-of-kin he could, by paying the debt of the intestate and satisfying the funeral and testamentary expenses, require that that property should not be sold and disposed of, and it would then become his alone,

entirely and absolutely in possession. What difference would it make if there were three or four next-of-kin? If they should choose to undertake the same process, and satisfy all the debts, and say that they desired to have the produce of this Pain's Hill estate, or whatever the specific property might be, what would there be to hinder them from taking that course and acquiring the property? No such course as that would be thought of (because it would be absurd) in the case of a creditor. A creditor would have no right to any particular chattel. All the right the creditors have is to be paid their debts out of that chattel, as well as out of other things; but their position as regards the specific property is wholly different from that of the next-of-kin."

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These passages show beyond all doubt that it was decided in *Cooper v. Cooper* (1) that a next-of-kin takes a specific interest in each portion of the intestate's estate which he can assign or release, and that it makes no difference whether the portion of the estate in question is a money fund or a chattel term.

The case of *Cooper v. Cooper* (1) was cited before this Court in *Holland v. Chambers* (2). In giving judgment I referred to most of the passages which I have just read. The Master of the Rolls cited one of the passages above quoted to which I had not on that occasion referred, and pointed out that the effect of the decision was as I have stated. The Lord Chief Baron followed, and commenced his judgment with these words:—

"It follows from the passages which have been read from the judgments in the House of Lords in *Cooper v. Cooper* (L. R. 7 H. L. 53) that the estate which, before administration, a sole next-of-kin has, by reason of the Statute of Distributions, in a chattel term of the intestate, must necessarily be of the same character as that of a *cestui que trust*, entitled to the entire beneficial interest in a term, subject to a trust to raise debts and expenses."

FitzGibbon, L.J., says (at p. 297):—

"The right to the tenancy is, as Lord Cairns says, a tangible thing *in specie*."

But it is not only in this Court that *Cooper v. Cooper* (1) has been thus interpreted. The same view of it precisely has been taken in England. Mr. Justice Fry refers to it in *In re Barber* (3),

(1) L. R. 7 H. L. 53. (2) [1894] 2 I. R. 285. (3) 11 Ch. D. 442.

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citing the passage read by Lord Cairns from Bacon's Abridgment, and also the first passage of Lord Cairns' judgment which I have above quoted.

For thirty years then *Cooper v. Cooper* (1) has been treated as deciding that a next-of-kin has a specific interest in the chattel real of the deceased, and I can see no reason why a judgment cannot be registered as a mortgage against such an interest. It seems to me that the result of the decision in *Eyre v. M'Dowell* (2) is that a statutory mortgage under the Judgment Mortgage Act attaches upon the entire beneficial interest of the debtor in the lands at the time of the registration of the judgment: in other words, that it operates as an innocent conveyance. The judgment mortgage takes out of the debtor everything that remains in him, or that he could assign. It is plain, from the language of Lord Cairns, that this debtor could have assigned his interest in this chattel term as a distinct subject-matter *in specie*. This interest of his is therefore captured by the judgment mortgage so as to make the creditor an assignee of a specific interest in the chattel term. It follows that the judgment creditor is entitled to maintain proceedings to administer the estate of the deceased.

Mr. Hemphill has strongly pressed us with the case of *Lord Sudeley v. The Attorney-General* (3). I do think that in the language used by Lord Halsbury and Lord Herschell there may be some apparent conflict with the course of reasoning upon which *Cooper v. Cooper* (1) is founded. But there is no inconsistency between the actual decisions in the two cases. I have shown that the point raised before us is governed by the decision in *Cooper v. Cooper* (1), and the apparent conflict between the language of the noble Lords in the later case (in which *Cooper v. Cooper* (1) was not cited), and the principles there laid down cannot afford any grounds for departing from what was there decided by Lord Cairns and Lord Hatherley, and ever since recognized as the law.

The appeal must, therefore, be allowed.

FITZGIBBON, L.J.:—

Though I cannot consider this case to be free from doubt, nor hold that it is conclusively ruled by *Cooper v. Cooper* (1),

(1) L. R. 7 H. L. 53. (2) 9 H. L. Cas. 619. (3) [1897] A. C. 11.

I think that a conclusion can be reasoned out from the principle of the judgments in *Cooper v. Cooper* (1), though we must take the responsibility of applying that principle to the Judgment Mortgage Act.

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The plaintiff recovered judgment for a debt against the defendant, and registered that judgment as a statutory mortgage against the interest of the defendant in a farm held from year to year, the defendant being one of the next-of-kin of a deceased tenant, and being in sole occupation. We have to decide whether a creditor who has taken such a proceeding has a *locus stándi* to obtain a decree to administer the whole estate of the *propositus* in order to realize his demand against one of the next-of-kin. It is immaterial that the debtor happens to have taken out letters of administration. It could not be contended that a mere creditor of one of the next-of-kin could get a decree for administration; but, on the other hand, it is conceded that the assignee of the share of a next-of-kin in a definite part of the assets, *e.g.* a chattel real, can administer the estate. Therefore the real issue is whether, by virtue of his statutory judgment mortgage, the plaintiff is an assignee of a specific interest in the farm of which the deceased was the tenant. A statutory mortgage operates by way of conveyance, and, as a mortgage, it is an assignment *pro tanto* of any estate or interest which the debtor could have conveyed by deed at the date of the registration of the judgment. We must make the hypothesis which the Act makes, and take the registration as conveying every and any estate or interest at law or in equity in the land which the debtor could have disposed of by an "innocent" instrument under seal, without the consent of any other person. Could the debtor have conveyed to his creditor by a deed of mortgage any estate or interest in the land before administration, he being only one of several next-of-kin?

If the debtor had *no interest in the land*, his deed could not affect the land, and a statutory judgment mortgage registered against him could not do so. Unless the statutory mortgage affects the land, it cannot raise the creditor into the position of an assignee of part of the chattel real of the deceased, nor can it entitle the creditor to administer the estate.

(1) L. R. 7 H. L. 53.

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What, then, is the interest which one of several next-of-kin has in a chattel real of his *propositus*, before administration, he being *in occupation*—I do not say *in possession*—as a next-of-kin? Could he convey any estate or interest in the land by deed? Upon this question the authorities on both sides of the channel are in a peculiar state, but perhaps more peculiar here than in England, for we have the Chief Baron in conflict with the Chief Baron. If there are two cases which we cannot reconcile, they are the judgment of the Chief Baron in *Herbert v. Rae* (1), deciding that a next-of-kin has no specific interest entitling him to redeem under the Ejectment Acts, and the judgment of the same learned Judge in *Holland v. Chambers* (2), laying down that he has an estate and interest *in specie* which he can occupy “as owner or tenant” under the Franchise Acts. In England the conflict is between the language—not the decision—of Lord Cairns and Lord Hatherley in *Cooper v. Cooper* (3), and the language—not the decision—of the Lords and Judges in *Sudeley v. The Attorney-General* (4). The closeness of the dates may palliate my omission to cite *Cooper v. Cooper* (3) when arguing *Herbert v. Rae* (1), though it will be observed that there was another formidable answer to my client’s claim upon the facts mentioned in the report. But I cannot understand how *Cooper v. Cooper* (3) escaped mention in *Sudeley’s Case* (4), except that that case was not very fully heard in the House of Lords, as judgment was delivered at the close of the arguments for the appellant. The judgments of Lord Cairns and Lord Hatherley in *Cooper v. Cooper* (3), on the other hand, appear to have been carefully considered.

The point raised in *Cooper v. Cooper* (3) resembles the point of this case more closely than does the point decided in *Sudeley’s Case* (4), because it arose on the equitable doctrine of election, and no man can be put to his election except between two tangible and definite objects of choice, capable of appreciation in comparison with each other. Effect is given to election, when made, by directing the electing party to release or assign what he gives up in exchange for what he takes, and therefore each must be an assignable piece of property. In *Cooper v. Cooper* (3) the two objects

(1) I. R. 9 C. L. 539.

(3) L. R. 7 H. L. 53.

(2) [1894] 2 I. R. 285.

(4) [1897] A. C. 11.

were (a) the interest of a next-of-kin in the personal estate of an intestate, and (b) a specific benefit under a will. It follows from the decision that the legatee was put to his election, that his interest as next-of-kin was held capable of being released, and also of being assigned. On this point the language of Lord Cairns and Lord Hatherley is clear, and it is applied alike to the share of a living son and to the shares of the next-of-kin of a deceased son of the original intestate

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Lord Cairns (at p. 64) says as to the living son—

“In point of substance and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is wholly immaterial. In the eye of the Court of Equity he was in substance the owner of one-third of the estate, and as such he was bound to elect.”

As to the deceased son he says—

“In substance *his sole next-of-kin was the owner* of the remaining one-third, subject only to the payment of the debts and expenses.”

Again (at p. 65) he says—

“As regards substantial proprietorship, the right of the next-of-kin remains clear *to every item* forming the personal estate of the intestate, subject only to those paramount claims of creditors.”

At p. 66 he says—

“I apprehend your Lordships will be perfectly clear that the residuary legatees had a *clear and tangible interest* in specie in the Pain’s Hill estate. . . . Can any person doubt but that *one of these next-of-kin might, before the administration of the estate of the intestate, have released to another next-of-kin, or assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses?* I apprehend it to be quite clear that the next-of-kin could take that course.”

Lord Hatherley (at p. 71) puts the argument against election, which he rejects, thus—

“That what the appellants take is *not a distinct interest*, is not the thing given by the testatrix, but simply a right to have that thing,

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together with the other assets of the testator, disposed of by the administrator, and applied to the payment of the debts of the intestate, and when those debts are paid then the balance—the balance only, and not the matter *in specie*—comes to the person called on to elect.”

He does not repeat the answer which had been given by Lord Cairns—viz. that the interest of a next-of-kin in the estate of an intestate was capable of being assigned—because he says that Lord Cairns had so fully disposed of the argument that it would be waste of time to pursue it further. But he adds an illustration of his own:—

“Whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate’s estate, if there were a sole next-of-kin he could, by paying the debts of the intestate, and satisfying the funeral and testamentary expenses, require that that property should not be sold or disposed of, and it would then become his own, entirely and absolutely, in possession. What difference could it make if there were three or four next-of-kin?”

Thus he first takes the case of a sole next-of-kin, simply because it is the simplest, and then says that there can be no difference in the case of several. Therefore he declares, in unqualified terms, that they too can assign their interests in the estate, or can take them *in specie* by clearing the debts, and if all can do this, it must follow that each can do likewise with his own share; subject, of course, to the exigencies of administration.

These judgments appear to me to establish that the assignee by deed of the share of a next-of-kin in a chattel term of an intestate takes an estate and interest in the specific property, and if so, he must be entitled to administer the whole estate, in order to get what belongs to him.

The question remains whether registration under our Judgment Mortgage Act operates as an assignment so as to convey a specific interest in the chattel term to the creditor. Mr. Hemphill has argued with great force that—even admitting that the share of a next-of-kin is assignable by deed—the object of the Judgment Mortgage Act was not to enlarge the class of property against which a judgment could be made effective, but simply to provide a new mode of enforcing the

judgment against the same property which could previously have been made available by execution to satisfy the judgment; and he contends that, as prior to the Act the interest of a next-of-kin in the chattel real of an intestate could not be seized, or taken in execution, under any writ issued on a judgment, registration of a judgment as a statutory mortgage cannot have any greater effect. But I think that the words of section 7 compel us to treat the effect of the registration of the affidavit as identical with that of the actual execution by the debtor of a deed assigning his share to the judgment creditor; if so, the House of Lords has declared in *Cooper v. Cooper* (1) that an interest in the specific property passes to the creditor, and therefore he is entitled to administer the estate.

I cannot see that the practical difficulties in administering estates, with which we have been threatened as the consequence of this decision, will be insurmountable or even serious. If a next-of-kin encumbers his share before the property is administered, the personal representative, *in realizing the assets*, need not take any notice whatever of the dealings of such next-of-kin with his own share; but when that share has been ascertained, and comes to be made over to the next-of-kin, then the personal representative must deal with it as subject to the charges which have been placed upon it, and he must recognise such charges and dispositions of it as may be made known to him. This duty is daily performed by the Land Judge in distributing the proceeds of sale of encumbered estates. Lord Cairns and Lord Hatherley point out that the next-of-kin can only deal with their shares subject to the paramount claims for debts of the deceased, and for the expenses of administration. Each item of the estate must bear its own share of these, and in the distribution of the net residue among the beneficiaries, by applying the rules of election and by marshalling, the rights of the beneficiaries can be adjusted. At all events, no greater difficulty can arise from treating the shares of next-of-kin as capable of being affected by a judgment mortgage than that which arises from treating them as assignable by deed.

I strictly limit my judgment to the case where the next-

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This conclusion appears to me to be a logical deduction from the principles laid down in *Cooper v. Cooper* (1), since followed by Court after Court, and I should have thought that this case was clear but for the judgments in *Lord Sudeley v. The Attorney-General* (2). That case might have been decided on a principle stated by Lord Halsbury (at p. 16) in these few words—

"The fixing of the character of the asset by the presence of the debtor may, or may not, have been logical, but it is so; and if it is a debt, and the debtor is here, that is the character of the asset, as fixed by the residence of the debtor, and the asset is English."

The question was whether probate duty was payable on the death of Mrs. Tollemache in respect of debts secured by mortgage on lands in New Zealand. Her husband had died in England with an English domicile, and his will was proved in England. At his death he was the owner of the mortgages, and they formed portion of his residuary estate. He devised and bequeathed his residuary estate to trustees and executors upon trust to pay the income to his wife for life, and he gave one-fourth of the *corpus* to her absolutely. She died before the mortgages had been realized, and before any portion of them had been appropriated to any particular share of the residue. The Crown claimed probate duty on the widow's fourth share of the mortgages. The principle on which the case was decided was that her

(1) L. R. 7 H. L. 53.

(2) [1897] A. C. 11.

representatives had no right except that of suing her husband's representatives; that this was an English right; and that she had no interest in the mortgages. But the learned Lords so enlarged upon the matter that it seems impossible to bring their judgments into harmony with those of Lords Cairns and Hatherley in *Cooper v. Cooper* (1). The House of Lords cannot overrule itself, and a conflict of law there is presumably impossible. If it were impossible to reconcile two decisions of the House of Lords, we should be bound to follow the earlier one, because the House has no jurisdiction to overrule it. An inferior Court can hardly presume to discriminate between an actual decision and a necessary inference from it, nor to act on Lord Halsbury's denial, in *Quinn v. Leathem* (2), that a case "can be quoted for a proposition that may seem to follow logically from it."

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To see how hard it is to reconcile these two sets of judgments I must quote a few passages from *Sudeley's Case* (3). The Lord Chancellor says (p. 17)—

"It is impossible to maintain that the New Zealand mortgages are specifically the property of the legatee,"

and he adopts the judgments of Lopes and Kay, L. JJ.

Turning to these judgments (4), Lopes, L.J., says (p. 363)—

"Neither Frances nor her executors could claim any part of this estate *in specie*. The right of the executors of Frances against the executors or her husband is to have his estate administered. . . . It is an English *chose in action*."

Kay, L.J., says (p. 364)—

"It is evident that the New Zealand mortgages were not assets of Frances, nor was any part of them. Neither she nor her executors could claim any part of them *in specie*. . . . That could only be done if these mortgages happened to remain unconverted when all debts and legacies were paid, and the residue became divisible, and all the residuary legatees agreed that the mortgages should remain unconverted. . . . The one-fourth share of his residuary estate which belonged to Frances would still be an English asset, because neither she nor her executors *would have any right to any such investments in specie*."

(1) L. R. 7 H. L. 53.

(2) [1901] A. C. 506.

(3) [1897] A. C. 11.

(4) [1896] 1 Q. B. 354.

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He quotes (p. 366) a passage from the judgment of Sir James Hannen, *In the goods of Ewing* (1), which he refuses to treat as an *obiter dictum*, as he believes it to be the ground of the decision. This passage is—

“If I were to constitute the applicant administrator with the will annexed of W. Ewing, he could not in that character take possession of or recover the outstanding assets of his uncle’s estate; he could not claim those assets themselves *virtute officii*; his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered.”

In *Sudeley’s Case* (2), Lord Herschell says (p. 18):—

“I do not think that the executors of Mrs. Tollemache have *any estate, right, or interest, legal or equitable*, in the New Zealand mortgages, so as to make them an asset of her estate.”

Lord Macnaghten adopts the judgments of Lopes and Kay, L.JJ.

Lord Shand says (p. 20)—

“None of the beneficiaries had in themselves *a right of ownership* in particular assets of Mr. Tollemache’s estate.”

Lord Davey says (p. 21)—

“There has been no election to take the estate or any portion of it *in specie*, nor has there been any appropriation by the executors. . . . Mrs. Tollemache *had no right of property in, or right to claim, any part of the mortgages in specie*. . . . Her executors acquired *only a right* to have the estate duly administered, but no right to have any part of the New Zealand mortgages appropriated to the estate of their testatrix *in specie*.”

I can no more reconcile these passages with the language of Lord Cairns and Lord Hatherley than I can reconcile *Herbert v. Rae* (3) with *Holland v. Chambers* (4). Almost every phrase used in the first judgments is repeated in the later ones, but with a negative put in. But the *decisions* do not conflict, if probate duty was held

(1) 6 P. D. 19.

(2) [1897] A. C. 11.

(3) I. R. 9 C. I. 539.

(4) [1894] 2 I. R. 285.

to be payable by the representatives of Mrs. Tollemache, on the ground that her right was enforceable in England only, and that the *lex fori* ruled the case. In any event, the decision in *Cooper v. Cooper* (1) is law for us, and in applying it, it is our duty to be loyal in our obedience to it, and I think it follows logically from that decision that the appellant acquired a specific interest in the intestate's chattel real against which he registered his judgment as a statutory mortgage, and that he is, therefore, entitled to maintain a suit to administer the estate, in order to realize his property.

The order of the Vice-Chancellor must be reversed, the appellant to have his costs here and in the Court below as part of his costs in the matter.

HOLMES, L.J. :—

The Vice-Chancellor, with his unique experience in the administration of the assets of testators and intestates, had evidently never heard before the present case of a judgment creditor of one of the next-of-kin of an intestate claiming to have the personal estate of the latter administered by the Chancery Division by reason of his having registered his judgment as a mortgage against a chattel real forming portion of the intestate's property.

It will not be denied that either a creditor or next-of-kin of an intestate may transfer to another his debt or his distributive share of the assets, and that such transfer will carry with it the right to a judgment for the general administration of the estate. Indeed in one case, *Sweeney v. Gallagher* (2), the Vice-Chancellor affirmed a decree for administration in the County Court obtained by a person to whom one of the next-of-kin had assigned by way of mortgage a chattel real that belonged to the intestate. But the question discussed on the hearing of this appeal does not relate to the rights arising from voluntary assignment. The matter for consideration is whether one of the next-of-kin has such an estate or interest in the chattel real as will vest in his judgment creditor upon the latter taking the steps provided by the 6th section of 13 & 14 Vict. c. 29. It is thereby enacted that a creditor under such a judgment as is therein mentioned may file

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(1) L. R. 7 H. L. 53.

(2) 22 I. L. T. R. 82.

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an affidavit containing, in addition to certain other prescribed particulars, a statement that, to the best of the knowledge and belief of the deponent, the person against whom such judgment was obtained is seized or possessed at law or in equity of any tenements, lands, or hereditaments of any nature or tenure, or has a disposing power over lands, tenements, or hereditaments which he may without the assent of any other person exercise for his own benefit, and may register such affidavit in the prescribed manner in the Registry of Deeds Office. The 7th section provides that this registration shall operate to transfer to the creditor all the lands, tenements, and hereditaments mentioned therein for all the estate and interest of which the debtor shall at the time of such registration be seized or possessed in law or in equity, or might at such time create by virtue of any disposing power which he might then without the assent of any other person exercise for his own benefit, but subject to redemption as therein provided. The transfer thus effected is what is known in Ireland as a judgment mortgage; and it is to be noted that what is transferred is all the estate and interest of the debtor in the lands, tenements, or hereditaments. That each of the next-of-kin has a right of some kind in relation to the assets of the intestate is beyond dispute; but it does not follow that he has either a legal or equitable estate and interest in lands held by the intestate for a term of years. There are, I think, two possible views of his right. It is either a right to have the assets administered in due course, and to receive from the administrator his distributive share of what will remain of the personal property converted in money after payment thereof of debts and testamentary expenses; or it is an actual estate and interest in common with the other next-of-kin in each and every item of the intestate's personal property, subject to certain liabilities to be ascertained in the course of administration.

In the year 1876 the point of controversy in *Herbert v. Rae* (1), in the Court of Exchequer, was whether one of the next-of-kin of a deceased lessee, who had been named a defendant in ejectment proceedings, can maintain an application for restitution under section 71 of Deasy's Act. Palles, C.B., in delivering the

(1) I. R. 9 C. L. 539.

judgment of the Court refusing the application, said that no doubt the applicant "as one of the next-of-kin is entitled to a share of the residue of the assets of the tenant which shall remain after payment of his debts and funeral and administrative expenses, and the lease in question is part of such assets. He, however, has no estate, legal or equitable, in the lease; nor has he any such right, title, or interest therein as would have enabled him prior to Deasy's Act to maintain a bill for redemption of the premises." There was another and independent ground for rejecting the application; but the foregoing statement of the law was made with the concurrence of the full Court; and if it is correct, I think that it would be decisive of the question now under consideration. The authority of this case is, however, considerably weakened by the circumstance that within the last few years the same distinguished Judge on the hearing of an equity appeal, after careful consideration and with the advantage of the fuller light afforded by intervening decisions, held that in circumstances practically identical with those of the present case the judgment creditor of the next-of-kin, who had registered his judgment as a mortgage against a chattel real of the intestate, was entitled to a decree for the administration of the personal estate of the latter: *Tench v. Glennon* (1).

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Before referring to further authorities, let us look at the matter from the point of view of legal principle. What is the effect of the Statute of Distributions? Does it merely place the next-of-kin in a position analogous to the creditors of the deceased, or does it confer on him a right similar in kind to that given by a will to a legatee of a specific chattel or chattel real? The creditor's right is to receive payment of his debt out of the assets of deceased, but he has no greater interest therein than when the debtor was alive. The legatee is entitled to receive the specific chattel bequeathed him, provided that in the due course of administration it is not required for the payment of the testator's debts. Take the case of a testator holding lands for a term of years and bequeathing them to all his next-of-kin by name as tenants in common. Upon his death the term vests in

Appeal. his executor, who, however, may on the next day assent to the
 1901. legacy; and thereupon all the estate and interest both in law and
 TEVLIN equity of the deceased in the chattel real become the property of
 v. the legatees in equal shares. Yet they do not take it freed from
 GILSENAN. the debts, for if the assets primarily liable are not sufficient the
 Holmes, L.J. creditors can have it sold for the purpose of discharging them.
 On the other hand, although the executor before he assents to
 the legacy can make good title to a purchaser, the Chancery
 Division would restrain him from selling the term, if it were
 not necessary to do so in the course of administration. Now,
 if this be the position of the legatee of a chattel real, it is
 impossible to hold that he has no interest in the lands in the
 interval between the death of the testator and the assent of the
 executor. I think that during this period he has, subject to
 liability to the debts and expenses, an equitable estate therein
 which by the executor's assent is converted into a legal estate.
 Turning now to a case of intestacy, is not the effect of the Statute
 of Distributions to make a will for the deceased giving to his widow
 and next-of-kin his personal estate in certain shares in the same
 way and with substantially the same result as if he had bequeathed
 the property to the same individuals in like shares?

There is much bearing on this subject to be found in the case
 of *Bradley v. Flood* (1), where Mr. Smith, the then Master of the
 Rolls, investigated in great detail the law on this subject both
 before and since the statute. He held in that case that in a suit
 for the administration of assets of an intestate the Court, may
 after payment of debts, declare the rights of the next-of-kin to
 chattels real without directing a sale, even although some of the
 next-of-kin insist upon a sale. I am of opinion that the decision
 involves the proposition that each of the next-of-kin has a right to
 his share in specie of the several items that compose the intestate's
 personal estates, subject only to the payment of the debts and fune-
 ral and testamentary expenses. This proposition is laid down with
 great precision in the case of *Cooper v. Cooper* (2). The House of Lords
 has never had the assistance of lawyers more thoroughly acquainted
 with this branch of the law than Lord Cairns and Lord Hatherley.

(1) 16 Ir. Ch. R. 236.

(2) L. R. 7 H. L. 53.

The following is the language of Lord Cairns :—" It was pressed on your Lordships that the interest of a next-of-kin in the estate of an intestate is an undefined and intangible interest ; that it is a right merely to have the estate converted into money, and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt, the right of a next-of-kin is a right which can only be asserted by calling upon an administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's assets into money, is a rule introduced simply for the benefit of creditors and for facility of division. For the benefit of creditors and for the facility of division among the next-of-kin the estate is turned into money ; but as regards substantial proprietorship, the right of the next-of-kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors." He then quotes Bacon's Abridgment to show that the Statute of Distributions is in the nature of a will for all persons who die intestate ; and applying this principle to the case before him, he said that it resembled the case of a person making a will in which, after directing his debts and expenses to be paid, he gave over his clear residue to his three children and his widow. From this he drew the inference that each of these persons had a clear and tangible interest in the lands held for a term of years. Lord Hatherley adopted this statement of the law, adding some additional illustrations ; and laid down the proposition that " the interest taken by the next-of-kin is clearly an interest in every chattel that formed part of the estate of the intestate subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on the part of the intestate."

I am unable to conceive a clearer declaration than is to be found in the speeches of the peers in *Cooper v. Cooper* (1), that each of the next-of-kin has an equitable estate and interest in his chattels real of his intestate ; and if this be so, a judgment

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registered as a mortgage under the provisions of the Act of 1850 has by the express terms of the statute the effect of transferring such estate and interest to the judgment creditor, who being thus placed in the position of the next-of-kin takes the latter's right to have the personal assets of the deceased administered by the Chancery Division. It is said that the case of *Cooper v. Cooper* (1) did not require for its decision the propositions laid down by Lord Cairns, and adopted by the three other peers who composed the House. I offer no opinion on this point. It is possible that the same conclusion might have been reached in another way; but the noble and learned Lords chose to adopt this way, and I do not feel myself at liberty to criticise them. Moreover, in this Court these propositions have been acted on again and again. In one volume of the Law Reports (Ireland), the second of 1894, *Cooper v. Cooper* (1) is referred to with approval ten times on the hearing of registry appeals; and the law as there laid down has been made the ground for giving the franchise to next-of-kin occupying holdings that had belonged to the intestates. It is now, I think, fairly well settled that leaseholds in England belonging to a person domiciled elsewhere devolve in case of intestacy upon the persons entitled according to the English Statute of Distributions: *Duncan v. Lawson* (2) and *Freke v. Lord Carberry* (3), and *In re the goods of Margaret Gentili* (4). This, I think, involves the principle that the next-of-kin take on the death of the intestate an actual and tangible estate and interest in the lands.

In this state of the authorities it is not to be wondered at that Palles, C.B., notwithstanding his judgment in *Herbert v. Kea* (5), held in *Tench v. Glennon* (6), a case identical with the present, that the plaintiff was entitled to a decree for administration; and at the conclusion of the argument I was prepared to allow the appeal. My attention has since been called to *Lord Sudeley v. The Attorney-General* (7). The question there was whether certain mortgages of lands in New Zealand that passed under a residuary bequest to a lady residing in England were

(1) L. R. 7 H. L. 53.

(2) 41 Ch. D. 394.

(3) L. R. 16 Eq. 461.

(4) L. R. 9 Eq. 541.

(5) I. R. 9 C. L. 539.

(6) 34 I. L. T. R. 157.

(7) [1897] A. C. 11.

English assets. I think that this might have been decided in the affirmative without impugning the propositions in *Cooper v. Cooper* (1), which were not referred to; but I admit that it is not easy to reconcile the language of some of the peers with what was laid down in the previous case. Lord Herschell, for example, said that “the fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache, or they, as her executors, were entitled to the New Zealand mortgages as an asset. I do not think that they had any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. . . . The right was to one-fourth of the clear residue of Mr. Tollemache’s estate—that is to say, what remains of his estate after satisfying debts and legacies.” It is not for me to say whether this is consistent with the statement of the law in *Cooper v. Cooper* (1). I sometimes find it difficult enough to reconcile inconsistent *dicta* of my own without attempting to bring the views of other Judges into harmony. If it were possible to conceive such an inconceivable thing as the House of Lords giving two contradictory decisions, I know not what rule of selection is to be adopted by other Courts—whether the maxim *prior in tempore potior in jure*, ought to be applied; or whether the last is binding; or whether the inferior tribunal can take its choice. Lord Cairns, in addition to great knowledge and experience, was such a master of language and logical exposition that he has perhaps an unfair advantage when his judgments are compared with those of lawyers of equal learning. I can only say that his views as to the estate and interest of the next-of-kin in the assets of the intestate have hitherto appeared convincing not only to myself, but to all the members of this Court; and being still of this opinion, I hold that the appeal ought to be allowed. It may be observed that I have dealt with this case irrespective of the fact that the plaintiff was in possession. The case has not been argued on this ground, for what I think was a good reason. It might have been inferred from the possession of the plaintiff, that he had received the chattel real as his distributive share of the assets after

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they had been fully administered; but in such case he would hold it as his own absolute property; and I understand from Mr. O'Brien that the plaintiff at first tried unsuccessfully to realize his security on this basis, and that he is now estopped from relying on this aspect of the case.

Solicitor for the plaintiff: *Callan*.

Solicitor for the defendant: *Sullivan*.

G. Y. D.

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June 3.

FLOOD v. FLOOD.

(1902. No. 400.)

Will—Construction—Specific legacy—"Stock or shares" in specified railway company—Testatrix possessed of stock in distinct undertaking—Misdescription—Ambiguity—Previous testamentary instrument—Evidence.

A testatrix by her will, dated 2nd January, 1900, bequeathed to certain legatees "all the preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed." She died in March, 1901.

The testatrix never had any stock or shares in the Dublin, Wicklow and Wexford Railway Company (properly speaking), but she had at the time of her death a sum of £1460 capital stock of the Dublin and Kingstown Railway Company, which was not expressly dealt with by her will. She became entitled to this stock in 1871. In 1856 the Dublin and Kingstown Railway Company had leased all their interest in their railway line to the Dublin, Wicklow and Wexford Railway Company at a rent; and the line from Dublin to Kingstown was managed and worked by the last named Company, forming an integral part of their system of railway communication. It was stated on affidavit that the public did not as a rule distinguish between the two companies, and in previous testamentary documents the testatrix used the two designations interchangeably:—

Held, that the sum of £1460 capital stock of the Dublin and Kingstown Railway Company passed under the specific bequest to the legatees, and did not fall into the residuary gift contained in the will (1).

Though no verbal or written statement of the intention of a testator is admissible, yet a previous testamentary instrument may be given in evidence to explain an ambiguous or insensible expression in a will (1).

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By her will, dated 2nd January, 1900, Joanna Flood appointed the plaintiffs, Frederick Leopold Flood and Wellesley Bradley Flood, the executors and trustees of her will, and bequeathed to her said trustees "all the preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed," upon trust for all or any of the children or child of her late nephew John Wellesley Flood, M.B., who should attain the age of twenty-one years, and if more than one in equal shares with remainders over. The testatrix had, at the time of her death, no preference stock or shares in the Dublin, Wicklow and Wexford Railway, nor any other stock or shares of that Company, but she had a sum of £1460 capital stock of the Dublin and Kingstown Railway Company, which was not expressly dealt with in her will.

The testatrix became possessed of the £1460 capital stock of the Dublin and Kingstown Railway Company under the will of her mother, who died 12th December, 1871, and held the same in its entirety until the date of her own death. She was not at any time possessed of any shares in the Dublin, Wicklow and Wexford Railway Company.

The affidavit of Frederick Bradley Flood (one of the children of John Wellesley Flood) contained the following statement:—"The general public do not conceive the existence of the Dublin and Kingstown Railway as a distinct Company from the Dublin, Wicklow and Wexford Company. The original owners of the line from Dublin to Dalkey, county Dublin, were the Dublin and Kingstown Railway Company, but they leased all their interest in the said line from Dublin to Dalkey, rolling stock, plant, &c., to the Dublin, Wicklow and Wexford Railway Company, by lease dated July 1st, 1856. All the present rolling stock used on the line bears the name of the Dublin, Wicklow and Wexford Railway Company, and, as far as I know, the name Dublin and Kingstown Railway Company does not appear on the printed documents of the Company or otherwise, so as to suggest the continued existence of that railway to the general public."

It appeared that by a former will, dated 9th March, 1872, the testatrix gave "my Kingstown Railway stock to my nephew

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said John Wellesley Flood." John Wellesley Flood died previous to 1887, and by another will, dated 8th February, 1887, testatrix gave "all the preference shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed, upon trust for all or any of the children or child of my late nephew John Wellesley Flood, M.B." By codicil to this will, dated 6th November, 1888, testatrix recited that she had left "preference shares in the Dublin, Wicklow and Wexford Railway Company," in trust for the child or children of her late nephew John Wellesley Flood.

The will of the testatrix also contained a bequest of "my stock in the Great Southern and Western Railway," upon trust for the plaintiff Wellesley Bradley Flood for life as therein, and after his death for his children as therein mentioned; but at the date of her death the testatrix had no stock in the Great Southern and Western Railway Company; she had, however, a sum of £875 consolidated $3\frac{1}{2}$ per cent. stock in the Midland Great Western Railway Company of Ireland, which was not expressly dealt with in her will. There were other specific gifts contained in the will. The testatrix appointed the plaintiffs residuary devisees and legatees, and probate was granted to them as executors of the will on November 1st, 1901.

There were three children of the late Dr. John Wellesley Flood living, of whom Frederick Bradley Flood had attained the age of twenty-one years.

The plaintiffs issued a summons (naming the three children of Dr. John Wellesley Flood as defendants) asking for the determination by the Court of the following questions:—

1. Whether the sum of £1460 capital stock in the Dublin and Kingstown Railway passed under the bequest in the will of the said testatrix of all the preference stock or shares in the Dublin, Wicklow and Wexford Railway of which she might at the time of her death be possessed; or whether the said stock of the Dublin and Kingstown Railway passed under the residuary bequest in the said will.

2. Whether a sum of £875 consolidated $3\frac{1}{2}$ per cent. stock in the Midland Great Western Company of Ireland passed under the bequest in the will of the testatrix of her stock in the Great

Southern and Western Railway, or whether the said stock of the Midland Great Western Railway passed under the residuary bequest in the said will.

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3. Out of what funds or by whom the costs of this application are to be paid.

G. Fitz Gibbon, for the plaintiffs, the executors and residuary legatees under the will :—

We submit the questions for the decision of the Court.

The preference stock or shares of the Dublin, Wicklow and Wexford Railway are not parts of the capital stock of the Dublin and Kingstown Railway Company in any sense. There is nothing in the will itself to show that testatrix intended the stock of the Kingstown line to pass under the bequest. If she did intend a gift to the defendants, she has not sufficiently denoted what thing she intended to pass under the gift. Extrinsic evidence of intention is not admissible. The Dublin and Kingstown Railway Company is a distinct undertaking from the Dublin, Wicklow and Wexford Railway Company. The principle of *Trinder v. Trinder* (1), which will be relied on by counsel for the defendants, does not cover a case of the kind. In that case the "Wilts and Somerset stock" in question was in fact stock of the Great Western Railway Company, and consequently was held to pass under a bequest of "my shares in the Great Western Railway."

The other question arising for decision is whether the bequest of Great Southern and Western stock captures the Midland Railway stock which belonged to the testatrix at the time of her death.

Herbert Wilson, K.C., for the defendants, the children of Dr. John Wellesley Flood :—

The capital stock of the Dublin and Kingstown Railway in the possession of the testatrix at the time of her death passed under the bequest of preference stock or shares in the Dublin, Wicklow and Wexford Railway Company. There can be no doubt that

(1) L. R. 1 Eq. 695.

M. R. testatrix intended to deal with the stock of the Kingstown line when
 1902. she made the bequest to the children of Dr. Flood. She was de-

FLOOD scribing something in her possession. Her first will gives the stock
v. (accurately described) to the father. Fifteen years afterwards she
FLOOD. gives it to the children (the father having died). She then mis-
 describes it. The general public in 1887 (as now) did not recognise
 the existence of the Kingstown Railway line as a distinct entity
 from the Dublin, Wicklow and Wexford Railway Company. As
 a working railway it has in fact no existence. The undertaking
 as a working concern has become the property of the Dublin,
 Wicklow and Wexford Railway.

Trinder v. Trinder (1) is very like this case. A testatrix bequeathed "my shares in the Great Western Railway"; she had no shares properly so described at the date of her will; but she had previously purchased Wilts and Somerset Railway shares, which undertaking had become vested in the Great Western Railway, the shares being converted into Wilts and Somerset stock of the Great Western. She also possessed preference and other stock of the Great Western; and it was held that both the Great Western shares and Wilts and Somerset stock of the Great Western passed under the bequest. In this case the Kingstown Railway is under the "management" of the Dublin, Wicklow and Wexford Railway Company, and "the stock is their stock to all intents and purposes." See the observations of Sir W. Page Wood in *Trinder v. Trinder* (1).

[Theobald on Wills, pp. 120, 121, was also referred to].

June 3.

THE MASTER OF THE ROLLS:—

This case comes before me on originating summons for the purpose of deciding without administration two questions arising on the will of Joanna Flood?

The facts are stated in the affidavit of Frederick Leopold Flood, one of the plaintiffs and also a residuary legatee under the will. He states that by her will she bequeathed to her trustees Bank of Ireland stock which should be standing in her name at the time of her death—nothing turns on that—and also "all the

preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed" upon trust for all or any of the children or child of her late nephew John Wellesley Flood, M.B., who should attain the age of twenty-one years, and if more than one in equal shares, with further trusts immaterial for the present purpose. The affidavit states that the testatrix had not at the time of her death any preference stock or shares in the Dublin, Wicklow and Wexford Railway, nor any other stock or shares of that Company. It does not appear that she ever had any such stock or shares; but she had a sum of £1460 capital stock of the Dublin and Kingstown Railway Company, which is not dealt with in terms by her will. The testatrix also bequeathed to the trustees "my stock in the Great Southern and Western Railway" upon trust for the plaintiff Wellesley Bradley Flood for life, and on certain trusts after his death. She had no stock in the Great Southern and Western Railway, but she had £875 consolidated $3\frac{1}{2}$ per cent. stock in the Midland Great Western, which was not specifically dealt with. The affidavit of Frederick Leopold Flood then states:—"I believe it was the intention of the testatrix to leave the said Dublin and Kingstown stock to the said Frederick Bradley Flood, Olivia Ella Flood, and John Wellesley Flood (that is, to the children of Dr. John Wellesley Flood), as she repeatedly told me so, and I also believe it was a clerical error in her will leaving preference stock or shares of the Dublin, Wicklow and Wexford Railway Company, as to my knowledge she never had such stock or shares." And he refers to a former will of the testatrix of 1872, in which she gave "my Kingstown Railway stock to my nephew John Wellesley Flood," and to another form of will, dated in 1887, after the death of John Wellesley Flood, in which she purports to leave "all the preference shares in the Dublin, Wicklow and Wexford Railway Company" to the children of John Wellesley Flood, and she refers to this will in a codicil, which is also made an exhibit of. I asked if further information could be given in reference to the matter, and another affidavit has been made, which states that testatrix became possessed of the £1460 capital stock of the Dublin and Kingstown Railway Company, under the will of her

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M. R. mother, in December, 1871, so she had had it for nearly thirty
1902. years at the time of her death, and had held it in its entirety.
FLOOD The affidavit states :—"The general public do not conceive the
v. existence of the Dublin and Kingstown Railway as a distinct
FLOOD. Company from the Dublin, Wicklow and Wexford Company. The original owners of the line from Dublin to Dalkey, county Dublin, were the Dublin and Kingstown Railway Company, but they leased all their interest in the said line from Dublin to Dalkey, rolling stock, plant, &c., to the Dublin, Wicklow and Wexford Railway Company. The lease is dated 1st July, 1856. All the present rolling stock used on the line bears the name of the Dublin, Wicklow and Wexford Railway Company, and, as far as I know, the name Dublin and Kingstown Railway Company does not appear on the printed documents of the Company or otherwise, so as to suggest the continued existence of that railway to the general public."

The legacy of the testatrix's "stock in the Great Southern and Western Railway" does not raise any question of difficulty. She had no such stock either at the date of her will or at her death, or at any other time so far as appears. The circumstance that she had some stock of an entirely different railway, of which her will contains no disposition, is immaterial, for the two Companies are quite distinct, and there is nothing to show that the testatrix used the correct designation of one stock to include a totally different property. It may have been—probably was—a blunder, but that is all that can be said about it. Clearly the Midland Great Western Railway stock did not pass by the gift. The case is far clearer than *Miller v. Travers* (1), where a devise of testator's estates in the county Limerick (where he had in fact no estates, though he had property in the city of Limerick) was held not to pass his estate in the adjoining county of Clare, although evidence was offered to prove that in the draft will the devise was of the Clare estates, and that a conveyancer to whom the draft was sent for settlement by mistake used the word Limerick instead of Clare; and there were other circumstances. The parol evidence was held inadmissible, and the devise inoperative.

But the other legacy involves a more difficult question. In law the Dublin and Kingstown Railway Company is distinct from the Dublin, Wicklow and Wexford Railway Company; and if that were all, this legacy would be quite similar to that which I have just held inoperative. But it is not all. The line belonging to the Dublin and Kingstown Company is leased to and entirely worked by the latter Company, and has been since 1856. It has no preference shares or stocks. Mrs. Flood held some of its stock for nearly thirty years; held it at the date of her will and at her death. She never had any stock or shares of the Dublin, Wicklow and Wexford Railway Company, nor any apparent intention of ever acquiring any. The dividends she received were paid exclusively out of the rent contributed by the Dublin, Wicklow and Wexford Railway Company to the Dublin and Kingstown Company, and therefore came from the former, and of course had priority over all dividends payable by it; so that the phrase "preference" used in the will is not wholly meaningless, though inaccurate. It is sworn to that the public do not as a rule distinguish between the two Companies. The undertaking of the Dublin and Kingstown Company is stated in Thom to have been "transferred under lease" to the Dublin, Wicklow and Wexford Railway Company. Those who use the line are carried in vehicles of the Dublin, Wicklow and Wexford Railway Company, to whom they pay their fares, whose tickets they obtain, and with whom they contract, over a line managed and repaired by servants of that Company, and forming an integral part of its system. Mrs. Flood is proved to have used the two designations interchangeably in previous testamentary documents, a fact not important save as showing the sense in which she was in the habit of using particular words.

Of course no weight can be given to her verbal or written statements that she intended to leave the stock in question to the children of Dr. John Wellesley Flood. To do so would be to repeal the Wills Act and the Statute of Frauds.

But the employment—at least if it be habitual—by a testator of doubtful words in a particular sense is a fact provable by parol evidence, not to contradict but to explain ambiguous or otherwise insensible expressions; and so I think that the previous will,

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codicil, and draft codicil are admissible for that purpose, though I do not go further than that.

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In *Trinder v. Trinder* (1) a testatrix by her will, dated April, 1857, made the following bequest :—"I bequeath to my brother Frank Smith Trinder the sum of £300 . . . also my shares in the Great Western Railway." At the time of making her will testatrix had no shares, properly so called, in the Great Western Railway or in any other railway company ; but she had in 1846 purchased five £50 shares in the Wilts, Somerset and Weymouth Railway. Under the provisions of the " Great Western Railway Act, 1851," the Wilts and Somerset undertaking became vested in the Great Western, and the shares were converted into Wilts and Somerset Railway stock of the Great Western Railway Company. She also had at the date of her will preference stock of the Great Western. After the date of her will she purchased further stock in the same Company. It was held that all the stock in the possession of the testatrix at her death passed under the bequest to her brother.

Sir W. Page Wood, V.-C., says :—" Railway stock is so analogous to shares in all respects that, on it being clearly shown that this testatrix had no railway shares at the date of her will, she must be held to have been describing something in her possession so as to pass this stock. She was clearly pointing to something she had at the time of her will ; and by the application of sect. 24 of the Wills Act, which draws down the bequest to the time of her death, all the shares or stock then in her possession (being a species of property capable of augmentation) would be included. With respect to the Wilts and Somerset stock, the undertaking was handed over to and has become the property of the Great Western Railway. The testatrix drew her dividends at their office. It is under their management, and the stock is their stock to all intents and purposes. The plaintiff is, therefore, entitled to all the stock held by the testatrix at the time of her death."

In one respect that case is a stronger decision than that which I am asked to make, for there the testatrix had at her death some stocks which accurately answered the description in the will, in addition to the stock which did not so answer it. Here we are

(1) L. R., 1 Eq. 695.

dealing with one estate, and one only inaccurately described (for in any case it was not "preference"); but the inaccuracy being in the nature of a latent ambiguity, I have no shadow of doubt but that the testatrix in fact meant to give the Dublin and Kingstown stock of which she had been so long in possession.

But there is one important distinction between this case and *Trinder v. Trinder* (1), viz. in the latter the words were "my shares in the Great Western Railway"; here the word "my" does not occur, nor is there any definite reference by the testatrix to the stock as a then existing possession of hers. On the contrary, the gift is of "all the preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed." The language is different from that of the immediately preceding gift of bank stock, and does not, in anything like the same clear way, point to an existing thing as the subject of the gift.

But looking at the whole will, which is framed on the plan of disposing specifically of the different items of her property, I can not bring myself to doubt what the testatrix meant, and I think she has made the intention, if not clear, at least sufficiently intelligible to enable me to effectuate it. Had she spoken of the stock "of which I may *still* be possessed at the time of my death" or "remain" possessed of, it would have been clearer; but, on the whole, I think that is what the language means, when all the surrounding circumstances are considered.

The answers to the questions will be—

(1) This stock passed under the bequest of "all the preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed," and not under the residuary bequest.

(2) This stock did not pass under the gift of "my stock in the Great Southern and Western Railway," but did pass under the residuary bequest.

(3) The costs are to be provided for out of the residuary estate.

Solicitor for the plaintiffs : *Bernard O'Grady*.

Solicitor for the defendants : *M. Good*.

R. W. L.

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ABSOLUTE GIFT — *Will* — *Construction* — *Superadded words*—*Directions as to investment for certain purposes*—*Motive of gift*—*Trust*.] A testator, after certain legacies, directed the balance of the purchase-money, realized by the sale of portion of his freehold property, to be equally divided among his four sons (of whom *J.* was one). He then provided as follows :—"I direct my executors to invest the share of my said son *J.* in the purchase of a good, substantial tenement house in a good neighbourhood (having first had same examined by an architect), where my said son and family may enjoy apartments in same free of rent, and that he may have, after the payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof" :—*Held*, that there was a gift of an absolute interest to *J.*, and that there was no trust created in favour of *J.*'s children. *Dowling v. Dowling* - M. R. 79

2. — *Will* — *Construction* — *Trust* — *Discretionary power*—*Charitable or other purpose*—*Death within three months*—*Devisee taking beneficially*—*Uncertainty*.] A testatrix, entitled to real estate, by her will provided as follows :—"I give and bequeath my dwelling-house, office-house, yard, and garden to the Rev. *T. L.*, parish priest, for a Roman Catholic school, or for whatever other purpose he pleases." Testatrix died within three months of the date of the execution of her will :—*Held*, that there was no trust created for a charitable purpose, and that the Rev. *T. L.* was entitled beneficially to the gift. *In re Harbison, deceased* ; *Morris v. Larkin* - - - M. R. 103

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ADVANCEMENT — *Power of* — *Will* — *Joint tenancy and tenancy in common*—*Gift of residue without words of severance*.] A power of advancement given to trustees of a will, to whom the residue of the property was devised by a testator for the benefit of his children, is inconsistent with a joint tenancy, and shows the children to be tenants in common. A testator devised the residue of his property to trustees for the benefit of six of his children, with power to his said trustees to advance such sum or sums as they might think fit, for the education and advancement in life of his said children :—*Held* (affirming the decision of Chatterton, V.-C.), that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that the children were tenants in common of the residue. *L' Estrange v. L' Estrange* [V.-C. 372 ; App. 467]

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APPORTIONMENT—*Will*—*Trustees*—*Investment*—*Mortgage* — *Arrears of interest*—*Principal sum* — *Deficient security* — *Capital and income*—*Tenant for life and remainderman*.] Funds held under a will in trust for *A.* for life, remainder for *B.* for life, with remainder over for certain persons, were invested in 1875 on the security of a mortgage of real estate then of sufficient value. The interest due on the mortgage fell into arrear, and in 1880 a petition for sale and the appointment of a receiver was presented by the trustees of the will, and a receiver was appointed in the same year. In 1898 *A.* (the first tenant for life) died. At her death considerable arrears of income were due to her, a portion of which was afterwards paid to her executors. In 1901 the lands subject to the mortgage were sold under the Land Purchase Acts, and did not realize the amount of the mortgage security. Prior to the sale nothing had been paid

APPORTIONMENT—*continued.*

to *B.* (the present tenant for life) in respect of interest:—*Held*, that, under the circumstances, the date of the sale of the mortgaged lands must be taken to be the period at which the deficiency of the security was first ascertained; and that the sum realized by the sale should be apportioned, in proportion to the amounts due at that date, between the executors of the first tenant for life, the present tenant for life, and the trustees of the will, as representing the persons entitled to the *corpus* of the fund. The principle of *In re Moore* (54 L. J. Ch. 432) preferred to that of *In re Foster* (45 Ch. D. 629). *Stewart v. Kingsale* [M. R. 496]

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BEQUEST FOR MASSES—Will—Perpetual gift to Dominican convent for Masses to be offered up in convent chapel—No direction as to celebration in public—Invalidity.] A testator gave the income of freehold and leasehold property, share and share alike, to the parish priest of *K.* and to the Convent of *E.* for the celebration of the Mass for the repose of the souls of his parents and his own, and a Solemn High Mass to be offered up annually on

BEQUEST FOR MASSES—*continued.*

the anniversary of his death, both in the parish chapel of *K.* and in the chapel of the Convent of *E.* The Convent of *E.* was a convent of the Dominican Order. There was evidence that it kept open for public worship:—*Held*, that the gift, as regards the convent, was not charitable, and was accordingly void as a perpetuity. *Kehoe v. Wilson* (7 L. R. Ir. 10), with respect to supposed decision, as a general proposition—that gifts for Masses for the souls of the dead, though to be celebrated in public, are not charitable—observed upon and explained. *Healy v. Attorney-General* - - - V.-C. 342

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P., owner in fee, demised lands in 1887 to the Secretary of State for War for twenty-one years at a rent of £43, with clause of surrender at the end of seven or fourteen years. In 1898 the Secretary of State for War served notice to treat:—*Held*, that the compensation payable to *P.* in respect of the reserved rent should be assessed on the basis of a purchase at a point of time immediately before the notice to treat, and should be valued at the rent reserved upon a lease for the residue unexpired of a term of twenty-one years, taking into account the likelihood of the lease being sooner determined, and that all the circumstances of the case and the holding should be taken into consideration, and that the arbitrator should find the reasonable value of the rent to be purchased on the basis of what a purchaser would have given for it immediately before the notice to treat. *Semble*—20 per cent. is an unreasonable addition for compulsory taking. *In re Secretary of State for War and Percy, and Defence Acts and Athlone Rifle Range* - - - M. R. 433

2. — *Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), sect. 80—Administration obtained, after payment of money into Court, for the purpose of making title—Colonial administrator—Power of attorney—Grant of administration in Ireland—Assets—Real estate—Estate duty payable in respect of purchase-money of lands compulsorily taken.*] An urban district council compulsorily acquired a part of certain freehold lands to which *K.* was entitled in fee, subject to a life annuity charged thereon. The arbitrator awarded the sum of £385 as compensation for the premises compulsorily taken. After the date of the award *K.* died in Australia, having by his will devised and bequeathed all his real and personal estate to a trustee in trust to sell and hold the proceeds of the sale in trust for an Australian charity. Administration of the estate of *K.*, with the will annexed, was granted in Australia. After *K.*'s death the sum of £385, representing the purchase-money of the premises compulsorily taken, was lodged in Court. Administration of the estate of *K.*, with the will annexed, was granted to *A.* in Ireland, who had been appointed by the Australian administrator his attorney for the purpose of taking out administration in this country and to collect the assets and property of *K.* Estate duty was paid by *A.* on the unsold real estate of *K.*, the fund in Court as representing the premises compulsorily purchased and some book debts due to the deceased. On the application of *A.* it was ordered that the money in Court should be paid out to him, and that the urban district council should pay all costs properly and necessarily

COMPULSORY PURCHASE—*continued.*

payable:—*Held*, that the costs of the power of attorney from the Australian administrator, the costs of the grant of administration in Ireland, and the portion of the estate duty applicable to the purchase-money of the lands compulsorily taken were properly payable by the urban district council. *Ex parte Lurgan Urban District Council; In re Kearns* - - - M. R. 157
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—*Indemnity against rent—Misleading condition—Sale under the Court—Constructive notice—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).*] Certain premises, described as lot 2, were sold by public auction, under the direction of the Court. The particulars stated that lot 2 was held, with other premises, under lease of 1877, for a term of years, subject to rent, and further stated that the said lot 2 was sold "subject to the said rent, but is indemnified therefrom by an indenture, dated 16th August, 1881, whereby the said lot was assigned to A. J." The 12th condition of the sale was as follows:—"Lot 2 was assigned by deed, dated 16th August, 1881, indemnified against the rent reserved by the said lease (of 1877), as in said deed mentioned and the purchaser shall not require any further or other indemnity in respect of the same, and shall not require any information as to the person or persons, or premises liable to the said rent, or bound by the said indemnity." The indenture of assignment of 1881 assigned lot 2 to A. J. "Indemnified from the rent, but subject to the covenants by the lessee and the conditions in the said lease." *M.* was declared the purchaser of lot 2. At the time of bidding he believed that the other premises demised by the lease of 1877 were bound to indemnify lot 2 against the rent reserved by the lease. The purchaser applied to be discharged from his contract on the ground that the provision as to indemnity contained in the deed of 1881 did not give him any such real or adequate indemnity against the rent as he was entitled to under his contract:—*Held*, that there was not an indemnity within the contract, and that the condition of sale was one which, taken in connexion with the particulars, rendered the information given by the document insufficient and misleading, and that therefore the purchaser should be discharged from his contract. *Manifold v. Johnston* - M. R. 7

2. — *Vendor and Purchaser—Licensed house—Conviction recorded on license—Omission to disclose—Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 31).*] On a sale of a public house with a license attached, the non-disclosure by the vendor of the fact that

CONDITIONS OF SALE—*continued.*

one conviction has been indorsed on the license is not a material omission which entitles the purchaser to refuse to complete the sale. *In re Ward and Johnston's Contract* - - - M. R. 73

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CORPUS AND INCOME—Deficient security—Tenant for life and remainderman 496

See APPORTIONMENT.

COSTS — *Practice* — *Liability of the Crown* — 18 & 19 Vict. c. 90, ss. 1, 2.] The Crown is not liable to pay costs under the Crown Suits Act (18 & 19 Vict. c. 90), unless the action, or proceeding, by, or on behalf of, the Crown, is taken in the name of the Attorney-General. *Reg. v. Beadle* (7 E. & B. 492) and *Secretary for War v. Booth* ([1891] 2 I. R. 692) approved of and followed. *In re Madden's Estate* - App. 63

— Compulsory purchase — Administration — Power of attorney - - - 157

See COMPULSORY PURCHASE. 2.

— Taxation—Fee-farm grant—Scale charge 1

See TAXATION OF COSTS.

COUNTY COUNCIL — *Public highway* — *Obstruction*—Rule as to inappreciability—*Mandatory injunction*—*Resolution ultra vires*—*Malfeasance*—*Action by Attorney-General on behalf of public.*]

A county council cannot legally sanction the erection of a permanent structure not authorized by the necessities of the public service, along or upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction. When the soil has been taken for county purposes everything between the road fences is *prima facie* part of the public highway. An obstruction placed upon a county

COUNTY COUNCIL—*continued.*

road can only be looked on as inappreciable when the obstruction is temporary in character, or when it is so small in extent that it could not, under any circumstances, impede traffic. *Attorney-General v. County Council of Mayo* - - - M. R. 13

COVENANT AGAINST ALIENATION — Renewable Leasehold Conversion Act
See FEE-FARM GRANT. [114]

COVENANT NOT TO BUILD—Purchase by lessee of reversion—Sub-lease 264, 285
See LEASE.

COVENANT TO RENEW—*Ecclesiastical lease* — *Covenant to renew toties quoties*—*Purchase of fee by covenantor*—*Obligation to renew* — *Irish Church Act, 1869 (32 & 33 Vict. c. 42), sects. 12, 31, 34.* A lessee for twenty-one years of church lands, made by the Dean of C., made a sub-lease of part for a like term, with a covenant to renew *toties quoties*. The lessee had no right of renewal, but the lease was renewed by custom. In the year 1878, after the passing of the Irish Church Act, 1869, the lessee named in the last renewal purchased the fee-simple of the lands from the Church Commissioners, pursuant to sect. 34 of the Irish Church Act. The sub-lessee was asked by the lessee to join in, and contribute to, the purchase. He declined, but afterwards claimed a renewal of his interest from the assignee of the purchaser:—*Held*, that he was not entitled. *Bernard v. Hungerford* - - - M. R. 89

CROWN—Immunity from costs - - - 63
See COSTS.

— Revenue—Succession duty - 109, 111
See SUCCESSION DUTY.

CUSTOM—Stock Exchange—Transfer of shares — Registration - - - 376, 383
See SHARES. 2.

DAMAGES—Landlord's claim for rent—*Fieri facias* - - - 167, 171
See SHERIFF.

— Unliquidated—Trial—Jury - 240, 375
See TRIAL.

DEATH "UNMARRIED AND WITHOUT ISSUE"—Will—Construction 333
See EXECUTORY GIFT.

DEPOSIT—Of title deeds - - - 23
See EQUITABLE MORTGAGE.

DOMICIL—Real estate in colony—*Lex loci* 451
See HUSBAND AND WIFE.

DUTY—Estate - - - 157
See COMPULSORY PURCHASE. 2.

— Succession - - - 109, 111
See SUCCESSION DUTY.

ECCLESIASTICAL LEASE — *Covenant to renew toties quoties*—*Purchase of fee by covenantor* - - - 89
See COVENANT TO RENEW.

ELDEST SON—*Settlement—Construction—Limitation of real estate—Mortgage by tenant for life and tenant in tail—Child other than son becoming entitled to estate under settlement—Disentailment—Portions for younger children—Power of appointment—Revocation of.*] By marriage settlement of 1839 an estate was settled on *H.* (the husband) for life, remainder to the first and every other son of the marriage successively in tail male. The estate was charged with a sum of money (subject to life-interests of *H.* and his wife therein) in favour of the children of the marriage "other than the son of the marriage who under the limitations of the settlement should become entitled to the lands" in such shares as *H.* and *M.* (the wife) or the survivor of them should appoint, and in default of appointment in trust for such children equally, the shares to be vested at twenty-one or marriage. There was a hotchpot clause in the settlement. There were four children of the marriage—*A.*, *J.*, and *C.*, sons, and one daughter. By deed poll of 1874 (after reciting the death of *C.* intestate) *H.* and *M.* appointed (subject to their life-interests therein) the sum of £5000, portion of the trust fund, to the daughter, and appointed the residue of the fund to *J.*, the second son. The deed poll contained a power of revocation over the share thereby appointed to *J.* *A.*, the first-born son, attained age, and joined with his father in mortgaging the estate for £1100 in 1876, and for £2000 in 1880, the lands having been disentailed by them for the purpose of carrying out the two loans, and to that extent only. *J.*, the second son, joined in the mortgage of 1880 for the purpose of covenanting with the mortgagee that the principal sum of £2000 thereby secured, and interest thereon, should be paid before and have priority over his share and interest in the trust fund charged on the estate. The father, *H.*, covenanted that so long as any money remained due on the mortgage security he would not exercise the power of revocation contained in the deed poll of 1874. *A.*, the eldest-born son, died in 1883, intestate and unmarried. In 1884 *H.* and *J.* disentailed the estate. *H.* died in 1896 (having survived his wife), and thereupon *J.* became owner in fee of the lands subject to incumbrances. By his will *H.* purported to revoke the appointment contained in the deed poll of 1874 in favour of *J.* of the residue of the trust fund (after setting apart £5000, the portion for the daughter), but made no further appointment of it:—*Held* (1), that *A.* had become entitled to the estate under the limitations of the settlement by reason of joining with his father in charging the inheritance, and that consequently his representatives could not share in the trust fund charged on the estate in favour of the other children; (2) that the revocation by *H.* in his will of the share appointed to *J.* by the deed poll of 1874 was invalid so far as it would prejudice

ELDEST SON—*continued.*

the security of the plaintiffs (who were assignees of the mortgage of 1880), but that without prejudice to the mortgage the revocation was valid as between the parties entitled under the settlement of 1839 to the trust fund; and that the residue thereof (after providing for the £5000 appointed to the daughter of the marriage) went as unappointed to *J.* and the representatives of *C.*, the share of *J.* therein being bound by his covenant in the mortgage deed of 1880. *Rooke v. Plunkett* - - M. R. 299

EQUITABLE MORTGAGE—*Registry Acts—Deposit of title-deeds unaccompanied by writing—Subsequent registered conveyance for value—Antecedent letters leading up to the deposit—Priority—Registry Act, 6 Anne (Ir.), c. 2.*] *S.*, who kept his bank account in the Londonderry branch of the Provincial Bank, in the beginning of 1895, was being pressed by the bank manager to give some further security, or to reduce his overdraft. At the time *S.* was negotiating for the purchase of the *P.* estate in the county of Westmeath. Several letters were written by *S.* to the bank manager, in some of which *S.* stated that as soon as he got the conveyance of the *P.* estate he would deposit it with the bank. The sale of the *P.* estate was concluded for £8000, and it was agreed that the entire purchase-money was to be left outstanding on mortgage. The conveyance to *S.* was executed on the 11th July, 1895, and the mortgage by *S.* to the vendor *T.* was executed on the same day. On the 13th July the town agent of the solicitor for *S.* deposited the conveyance with the Provincial Bank at their office in Dublin. There was not any memorandum in writing at the date of the deposit, and the deed was sent down to the Londonderry branch of the bank from the Dublin office the same day. In July, 1896, *S.* executed a deed of mortgage of the *P.* estate to *F.* and *S.* to secure the repayment of £4500, and on being asked by *F.* and *S.* for the conveyance to himself, *S.* stated that it was in the custody of *T.*, the prior mortgagee. The mortgage to *F.* and *S.* was duly registered:—*Held* (by FitzGibbon and Holmes, L.J.J.; *dissentiente*, Walker, L.J.; reversing the decision of Meredith, J.), that the letters from *S.* to the bank did not amount to an agreement to create a charge, and did not require to be registered in order to preserve the priority of the bank over the mortgage to *F.* and *S.* *In re Stevenson's Estate* [APP. 23]

ESTATE DUTY—Compulsory purchase 167
See COMPULSORY PURCHASE. 2.

ESTATE TAIL—*Will—Estate in reality—Estate in special tail—Condition.*] A testator, after leaving certain annuities to his wife and daughter, which he charged on his landed property, left his lands (held in fee-simple) to his son *R. J. M.*, with the exception of what his wife was to get;

ESTATE TAIL—continued.

"but the said *R. J. M.* shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female, of proper conducted parents":—*Held* (reversing the decision of the Vice-Chancellor), that *R. J. M.* took an estate in special tail. *Magee v. Martin* - - - - - APP. 367

— Settlement—Reformation—Intrinsic evidence
See REFORMATION OF DEED. [477, 485]

EVIDENCE—Intrinsic—Reformation of deed
See REFORMATION OF DEED. [477, 485]

— Principles of valuation - - - - - 139
See FAIR RENT.

EXECUTOR—Liability for default of co-executor—Putting assets into sole control of co-executor.]

A testator died on the 3rd February, 1897, having appointed *J.* and *M.* executors, both of whom proved the will. They realized the assets, and at the end of 1897, or commencement of 1898, three sums of money—(a) a sum of £1330 standing on deposit receipt in the Hibernian Bank, (b) £1500 on deposit receipt with the Antrim Iron Ore Company, and (c) £886 Consols, were called in and paid over to *M.*, who was proprietor of a bank which received money on deposit, paying interest thereon. But these moneys were not deposited in *M.*'s bank; they were lodged to the credit of *M.*'s account with the Bank of Ireland, which at the time was overdrawn. A delay of some months occurred in the administration consequent upon a claim against the testator's assets, which on investigation turned out to be unfounded. In January, 1899, *M.*'s bank stopped payment. It appeared that the testator had several dealings with *M.*'s bank:—*Held* (reversing the decision of the Vice-Chancellor), that the action of *J.* in placing these sums of money in the sole control of his co-executor was not what an ordinary prudent man would have done with his own money, that handing the money over to *M.* was not lodging the money with a banker, and that *J.* was jointly and severally liable with *M.* for the loss. *Lowe v. Shields* APP. 320

2. — Right of retainer—Receiver—Rents collected by—Funds transferred from other matter.] An executor, also a creditor of his testator, *held*, in an administration action, not entitled to a right of retainer in respect of his debt out of rents of a chattel real collected by a receiver and lodged by him to the credit of the action, but entitled to such right out of a sum lodged in Court under the Trustee Relief Act (11 & 12 Vict. c. 58), to which the testator was entitled in remainder, and which, having fallen into possession after his death, was, in presence of the executor, transferred to the credit of the action. *Taaffe v. Taaffe* - - - V.-C. 148

EXECUTORY GIFT—Will—Construction—Devise—Gift over—"Die unmarried and without

EXECUTORY GIFT—continued.

issue"—Primary meaning—Context.] By her will a testatrix devised her estate and interest in certain hereditaments in trust for the use of her youngest son *H.*, and his heirs, and (after devising other property in trust for her four youngest daughters, which, on the youngest of them attaining twenty-one, was "to become the property of such of them as shall have remained unmarried in equal proportions") she provided that if *H.* should "die unmarried and without issue" the hereditaments devised to him should go over to her sons *E.* and *M.* as tenants in common, "the share of either of them dying unmarried to go and become the estate and property of the survivor." *H.* married, but his wife predeceased him. He had no children. *Held*, that the words "die unmarried and without issue" following the gift to *H.* must be read in their primary signification as meaning "die without ever having been married and without issue"; that, consequently, *H.* became indefeasibly entitled to the hereditaments, and the gift over in favour of the other sons did not take effect. *Roberts v. Bishop of Kilmore* - - - - - M. R. 333

FAIR RENT—Landlord and tenant—Land Law (Ireland) Act, 1881, section 48, sub-section 4—Principles of valuation—Evidence that Court valuers acted on erroneous principles.] Some time previous to the hearing of the cases before the Court the agent of the landlords met on the farm of a tenant, whose fair rent was then being fixed, two Court valuers, to whom he pointed out an adjoining farm, telling them its acreage and the rent at which it had lately set, and the gross sum paid by the tenant on entering. One of the Court valuers replied, in the hearing of the other, that the only thing they took into consideration was what, in their opinion, the tenant could make out of the farm. The circumstances of the district—what the land would let for in the district—did not influence them. On the hearing of the cases now before the Court these statements were relied on by the landlords as showing that the Court valuers were in the habit of acting on erroneous principles, and that their reports should be accordingly rejected:—*Held*, by the Court of Appeal (affirming the decision of Meredith, J.), that the evidence did not show that the Court valuers were in the habit of acting, or had acted, on erroneous principles. *Earl of Gosford, Landlord; Alexander and others, Tenants. Duke of Manchester, Landlord; Sheelin and others, Tenants* - - - - - APP. 139

— Bona fide occupation—Tenants in common—subletting by one - - - - - 410

See SUBLETTING.

FEE-FARM GRANT—Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105)—Covenant against alienation—Covenant to pay increased rent

FEE-FARM GRANT—*continued.*

on assigning or demising to any person outside a limited class—*Land Purchase Acts—Redemption of superior interest.*] By a lease for lives renewable for ever, made in the year 1763, the lessee covenanted to pay an additional rent if the lessee, his heirs or assigns, assigned or demised the lands, without the lessor's consent, to a person or persons other than the child or grandchild of the person so aliening or demising same. In a fee-farm grant made, in lieu of the said renewable lease, in the year 1852, a precisely similar covenant was inserted:—*Held* (by the Court of Appeal), that the covenant was valid, and that regard must be had to it in fixing the redemption price of the rent payable under the fee-farm grant on a sale by the fee-farm grantee to an occupying tenant, under the Land Purchase Acts, through the Irish Land Commission. *Billing v. Welch* (I. R. 6 C. L. 88) overruled. *In re M'Naul's Estate; Ex parte Traill*

[APP. 114]

— Printed form—Costs—Scale charge - - 1
See TAXATION OF COSTS.

FIERI FACIAS—Landlord's claim for rent—
 Damages - - - - 167, 171
See SHERIFF.

FORFEITURE—Non-residence—Settled Land
See SETTLED LAND ACTS. [162]

HIGHWAY—Obstruction to—County Council—
 Action by Attorney-General - 13
See COUNTY COUNCIL.

HOLDING—*Bona fide* occupation—Joint tenants
 —Subletting by one - - - 410
See SUBLETTING.

HUSBAND AND WIFE—*Intestates Estates Act*, 1890 (53 & 54 Vict. c. 29)—*Widow's charge*—*Dower*—*Lex domicilii*—*Lex loci as applied to proceeds of sale of Victorian lands*—*Victorian Intestates Estates Act*, 1896 (No. 1419)—*Order of application of assets in payment of debts.*] A domiciled Irishman died in Ireland, intestate without issue, leaving a widow surviving. His property in Ireland consisted of freeholds, chattels real, furniture, stock, and cash. He was also possessed of lands in the colony of Victoria, granted to him in fee by the Crown, which lands by the law of the colony were regarded and devolved as personal estate. The only creditors were in Ireland. Administration was taken out in Ireland by the widow, and in Victoria by a person appointed for the purpose, who sold the lands, and remitted the net proceeds to the widow. By the Victorian Intestates Estates Act, 1896, a widow is entitled, on the death of her husband intestate and without issue, if his estate is over the value of £1000, to a charge of £1000 upon it, and the residue is divisible between the widow and the next-of-kin. The widow brought an action against the heir-at-

HUSBAND AND WIFE—*continued.*

law and one of the next-of-kin of the deceased, and claimed (1) £1000 out of the proceeds of sale of the Victorian lands, as well as £500 out of the real and personal estate in Ireland, (2) dower out of the Irish freeholds, and (1) a moiety of the residue of the proceeds of sale of the Victorian lands, and of the Irish personal estate, after payment thereof of the debts of the intestate:—*Held*, (1) that the plaintiff was entitled, under the Victorian Act, to £1000 out of the proceeds of sale of the Victorian lands; (2) that the balance was to be taken as personal estate, and added to the Irish personality, and that the debts were to be paid out of the blended fund; (3) that the widow was entitled to £500 out of the remainder of this blended fund, and out of the Irish real estate, to be apportioned as directed by the Intestates Estates Act, 1890; (4) that of the residue of the personality the widow was entitled to one moiety, and the next-of-kin to the other moiety; (5) that the widow was entitled to dower out of the residue of the realty, which, subject thereto, went to the heir-at-law. *In re Rea, deceased; Rea v. Rea* - M. R. 451
 — Marriage Settlement.

See SETTLEMENT.

IMPLIED COVENANT—Sub-lease—Building
 scheme - - - - 264, 288
See LEASE.

INAPPRECIABILITY—Rules as to—Obstruction to highway—County Council—
 Resolution - - - - 13
See COUNTY COUNCIL.

INDEMNITY—Rent—Misleading conditions of sale - - - - 7
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— Rent—Redemption - - - - 364
See REDEMPTION.

INFANT—Conveyancing Act—Trustees 429
See TRUSTEE.

INJUNCTION—Building covenant—Sub-lease
See LEASE. [264, 288]

— Mandatory—Obstruction to highway—Action by Attorney-General on behalf of the public - - - - 13
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INTEREST ON MONEY—Apportionment—
 Tenant for life and remainderman—Deficient security - - - - 496
See APPORTIONMENT.

— Transfer of mortgage—Arrears - 471
See MORTGAGE.

INTESTACY—Registration of judgment as mortgage against share of next-of-kin
See JUDGMENT MORTGAGE. [514]

INTESTATES ESTATES ACT—Widow's rights—Lands in Ireland and colony 451
See HUSBAND AND WIFE.

INVESTMENT—Deficient security—Tenant for life and remainderman - - - 496
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— Directions as to—Will—Absolute gift 79
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JOINT TENANCY—Subletting by one joint tenant - - - - 410
See SUBLETTING.

— Will — Construction — Power of advancement - - - - 372, 467
See ADVANCEMENT.

JUDGMENT MORTGAGE—*Judgment against one of the next-of-kin of an intestate—Registration as mortgage against interest in intestate's chattel real—13 & 14 Vict. c. 29.* A judgment debtor, being one of the next-of-kin of a deceased intestate, has an interest in a chattel real belonging to the intestate of such a specific character that it can be affected by the registration of the judgment as a mortgage against it. *Tevlin v. Gilsenan* APP. 514

JURY—Trial—Chancery action—Issues of fact
See TRIAL. [240, 375]

LAND LAW (IRELAND) ACTS—*Bona fide* occupation—Joint tenants—Subletting
See SUBLETTING. [410]

— Court valuers—Principles of valuation 139
See FAIR RENT.

— Redemption of rent—Indemnified lands 364
See REDEMPTION.

— Redemption of superior interest—Fee-farm rent—Covenant against alienation 114
See FEE-FARM GRANT.

— Redemption of tithe rentcharge—Number of years' purchase - - - 444
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LANDLORD AND TENANT—*Fieri facias*—Claim for rent—Damages - 167, 171
See SHERIFF.

— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

— Lease.
See LEASE.

LAND CLAUSES ACT—s. 80—Costs—Estate duty - - - - 157
See COMPULSORY PURCHASE. 2.

LEASE—*Landlord and tenant—Restrictive covenants as to building—Several sub-leases made subject to covenants in the head lease—Acquisition of reversion by lessee—Implied obligation on lessee towards sub-lessees to observe restrictive covenants—Building scheme.* By lease, dated the 15th February, 1854, the Earl of R. devised two adjoining parcels of land near Belfast to *W. T.* for a term of 1000 years, at a yearly rent, and subject, among others, to covenants on the part of the lessee (a) to expend a sum of £500, at least, in erecting a private dwelling-house on one parcel of the demised premises; (b) not to use any house on either parcel except as a private dwelling-house, or

LEASE—*continued.*

as a "tea" house, without the consent, in writing, of the lessor; (c) that each private dwelling-house to be occupied on the smaller parcel must, except with the consent of the lessor, have cost at least £400; (d) that in the event of the lessee erecting on the larger parcel a house of public entertainment the same should be shut in by planting from the view of the adjoining premises; and (e) that each house intended to be erected on the larger parcel should be of the annual value of £25 at least. At different dates during the next ten years *W. T.* made nine different sub-leases, eight of which were stated expressly to be subject to the convenants and restrictions contained in the head lease. Three of these sub-leases contained covenants by the sub-lessees for the expenditure of money in building, and restricting the user of the houses on the premises; but these covenants were not identical with, nor in some cases even consistent with, the covenants by the lessee in the head lease. Others of the sub-leases contained no provisions as to building or restrictive covenants on the user. Having made these sub-leases, *W. T.* built a handsome villa on the remaining portion of the demised premises retained in his hands. The portions of the premises comprised in the sub-leases which contained no restrictive covenants became vested in the plaintiff, and the residue of the premises comprised in the head lease, as well as the estate and interest of *W. T.* under the head lease, became vested in the defendants, who also acquired the reversion in fee-simple expectant on the determination of the head lease. The defendants, after becoming so entitled, built upon the larger portion of the land demised in 1854 seven shops and several cottages not of the annual value of £25 each:—*Held* (by the Court of Appeal, reversing the decision of the Master of the Rolls), that there was no express or implied obligation to observe the covenants in the head lease which the plaintiff—as entitled to the land comprised in the sub-leases which she had acquired—could enforce against the defendants, and that she was not entitled to obtain an injunction restraining the defendants from building and using the premises in a manner different from that allowed by the head lease. *Graham v. Craig* M. R. 264; APP. 285

— Ecclesiastical—Covenant to renew—Purchase of fee by covenantor - - - 89
See COVENANT TO RENEW.

— Renewable for ever—Fee-farm grant—Covenant against alienation - 114
See FEE-FARM GRANT.

— Surrender—Compulsory purchase—Basis of value - - - - 433
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See EQUITABLE MORTGAGE.

- LICENSING ACTS**—35 & 36 Vict. c. 94, s. 31—
Sale of licensed house—Conviction recorded on license—Omission to disclose
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- LIMITATIONS, STATUTE OF**—Succession duty—52 Vict. c. 7, sect. 12, sub-sects. 1, 2, 3 - - - 109, 111
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- LOCAL REGISTRATION OF TITLE ACT, 1891**—Sale—Condition precluding objection for non-registration - - 83
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- MANDATORY INJUNCTION**—Obstruction to public highway - - 13
See COUNTY COUNCIL.
- MASSES**—Bequest for - - 342
See REQUEST FOR MASSES.
- MISDESCRIPTION**—Stock, bequest of 538
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- MISTAKE**—Settlement—Reformation 477, 485
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- MORTGAGE**—*Transfer with concurrence of mortgagor—Arrears of interest paid by transferee treated as principal bearing interest.* Transferee of a mortgage, the mortgagor joining in the transfer, held, entitled to treat as principal bearing interest arrears of interest on the original debt due at the date of the transfer, and paid by him to the mortgagee. *Agnew v. King* - - V.-C. 471
- By tenant for life and tenant in tail - 299
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- OBSTRUCTION**—Public highway—Mandatory injunction—Action by Attorney-General
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- ORDERS GENERAL**—1884 (15th April), Solicitors' Remuneration Act, 1881, Schedule 1, Part 2 - - 1
See TAXATION OF COSTS.
- PAYMENT OUT OF COURT**—*Lands Clauses Acts—Tenant for life—Small amount.* A sum of £30, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Acts, paid out to a tenant for life without any undertaking by him to expend the same in improvements. *In re Navan Urban District Council; Ex parte Fitzherbert* - - V.-C. 6
- PERPETUITY**—Gift whether charitable—Masses - - 342
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- PORTIONS**—Eldest son—Younger son becoming entitled to estate - - 299
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- Payment out of Court—Small amount—Tenant for life - - 6
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- Proceedings on behalf of the Crown—Costs
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- PRIORITY**—Equitable mortgage—Antecedent letters leading up to - - 23
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PROMOTER—Company—Contract with 349
See SHARES. 1.

PUBLICHOUSE—Sale—Conviction recorded on license—Omission to disclose - 73
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PURCHASER FOR VALUE—Trustees of marriage settlement - 109, 111
See SUCCESSION DUTY.

RECEIVER—*Landed Estates Court and Land Judge—Life estate—Cost of appointing—Money expended by receiver.*] An order for sale was made on the petition of a tenant for life of lands, who subsequently became tenant to the Court pending the matter. In 1889 a receiver was appointed on the application of a mortgagee. In 1895 that receiver was discharged, and *W.* was appointed receiver on the application of the owner. In 1899 the owner died, leaving no assets, and there was a large arrear of rent. *W.* had not collected any rents out of the lands, but he had expended some money on behalf of the estate, and incurred costs, when he was discharged by the remainderman:—*Held* (reversing the decision of *Ross, J.*), that *W.* was not entitled to be paid the money expended, or the costs, by the mortgagee who had first appointed a receiver. *In re Kearney's Estate* - - - - - App. 59
— Rents collected by—Executor—Retainer 148
See EXECUTOR.

REDEMPTION—Landlord and tenant—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Form of order providing for future payment of the proportion of the rent so redeemed.] Form of order under sect. 33 (4) of the Land Law (Ireland) Act, 1896—in case where a liability to a rent is apportioned and redeemed out of the purchase-money, and a right of indemnity exists in respect of such liability—making provision for the future payment of the proportion of the rent so redeemed to the person entitled to the purchase-money out of which the redemption is effected. *In re Kennedy's Estate; Andrews, Petitioner* - - - - - *Ross, J.* 364
— Superior interest—Fee-farm rent—Covenant against alienation - - - - - 114
See FEE-FARM GRANT.

— Tithe rentcharge—Number of years' purchase
See TITHE RENTCHARGE. [444
— Transferred mortgage—Concurrence of mortgagor—Arrears of interest - 471
See MORTGAGE.

REFORMATION OF DEED—Settlement—Mistake—Limitation of real estate without words of inheritance—"In tail"—No evidence of intention *dehors the deed.*] By a marriage settlement, executed in the year 1859, lands belonging to the sister of the husband were, subject to her life estate, limited to the husband for life, with remainder (in default of exercise of a power of

REFORMATION OF DEED—continued.

appointment given to him), if there should be only one child of the marriage, to such child "in tail." The only interest limited back to the settlor was a general power of appointment in default of issue of the marriage. A power of sale and a leasing power were given to the trustees exercisable during the respective lives of the two tenants for life, with their respective consents, and during the minority of any child of the marriage. There was no evidence of the intention of the parties apart from the settlement itself, the instructions on which it was prepared not being forthcoming, and the solicitor who prepared it, as well as the parties to it, being dead. There was only one child of the marriage, the plaintiff, who brought this action against the heir-at-law of the settlor and the trustees, seeking to have the deed reformed by the insertion of proper words of limitation, so as to confer on her an estate tail in the lands:—*Held* (by the Court of Appeal, affirming the decision of the Master of the Rolls), that the deed itself afforded evidence of the intention of the parties sufficient to enable the Court to rectify the mistake and to reform the settlement by the introduction of technical words of limitation, so as to confer an estate tail on the plaintiff. *In re Bird's Trusts* (3 Ch. D. 214), approved and followed. *Fitzgerald v. Fitzgerald* - M. R. 479; [App. 485]

REGISTRATION—Judgment mortgage—Share of next-of-kin - - - 514
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— Local Registration of Title Act (1891) 83
See CONDITIONS OF SALE. 3.
— Transfer of shares—Discretionary power of Company - - - - - 376, 383
See SHARES. 2.
— Written contract—Equitable deposit—Antecedent letters - - - - - 23
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RENEWABLE LEASEHOLD CONVERSION ACT—Fee-farm grant—Printed form—Costs - - - - - 1
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— Fee-farm grant—Restriction on alienation—Redemption of rent - - - 114
See FEE-FARM GRANT.

RENT—Chattel real—Receiver—Executor—Retainer - - - - - 148
See EXECUTOR. 2.
— Indemnity against—Misleading condition 7
See CONDITIONS OF SALE. 1.
— Redemption.
See REDEMPTION.

RESCISSION—Contract—Transfer of shares—Refusal of Company to register transfer
See SHARES. 2. [376, 383]

RESIDENCE—Forfeiture clause—Settled Land Acts - - - - - 162

See SETTLED LAND ACTS.

RESIDUARY GIFT—Tenancy in common
See ADVANCEMENT. [372, 467]

RETAINER—Executor - - - 148
See EXECUTOR. 2.

REVENUE—Succession duty—Statute of Limitations - - - - - 109, 111
See SUCCESSION DUTY.

REVOCAION—Appointment—Portion 299
See ELDEST SON.

SALE—Practice—Order for sale of land—Appointment of person to convey—Form of order—Trustee Act, 1893 (56 & 57 Vict. c. 53) sect. 33.] Form of order and mode of execution of conveyance where the Court orders a sale of land and a person entitled, being a party to the proceeding, refuses to execute the deed. *Beale v. Bragg* [V.-C. 99]

— Non-registration under Local Registration of Title Act, 1891 - - - - - 83

See CONDITIONS OF SALE. 3.

— Publichouse—Conviction recorded on license
—Omission to disclose - - - 73

See CONDITIONS OF SALE. 2.

— Settled Land Acts—Forfeiture clause 162
See SETTLED LAND ACTS.

— Shares—Refusal of Company to register 376,
See SHARES. 2. [383]

— Under Chancery Division—Indemnity—
Misleading conditions - - - 7

See CONDITIONS OF SALE. 1.

SECRET TRUST—Will—Property left by will to legatee absolutely—Secret arrangement that the legatee was to leave this property, along with property of his own, to a nephew of the testator.] In the year 1899 *A*, a clergyman, made his will, and thereby, after making two pecuniary bequests, left the residue of his property to his brother *B*, a solicitor, whom he appointed his executor. In the year 1891, during the lifetime of *A*, *B* prepared, in his own handwriting, a draft will, whereby, after leaving the plaintiff, who was his nephew, a property called Owenbeg, he devised and bequeathed all the residue of his property to the defendant, who was the son of a deceased nephew. He sent this draft will to the plaintiff, who also was a solicitor, for his suggestions. Immediately afterwards, and during the lifetime of *A*, *B* prepared, in his own handwriting, a draft codicil to his will, in which he recited *A*'s will, by which he was appointed residuary legatee and executor, and also recited the particulars of *A*'s property, and thereby, in the event of his surviving his brother, and becoming entitled to *A*'s property, he devised and bequeathed the same, item by item, to the plaintiff, and he stated that he made these dispositions in pursuance of an arrangement made

SECRET TRUST—continued.

with his brother *A*, that the property mentioned in the draft codicil should go, along with Owenbeg, to the plaintiff, and that his own property should go to the defendant, adding that if *A* survived him, he would make a new will carrying out the provisions of the codicil. *A* died shortly after the preparation of the draft codicil, and before either it or the draft will were executed, and *B* thereupon prepared and executed a will practically incorporating the provisions of the draft will and codicil, but not stating anything about the arrangement made with his brother. *B* sent this will, while in draft, to the mother of the defendant, and at the same time wrote a letter, which he did not send her, stating that he had left the plaintiff Owenbeg, and a full equivalent for the money and property which he had taken on *A*'s death, "it being arranged between us that his property was to go to *J*," the plaintiff, "and mine to *W*," the defendant's father. By a subsequent will and codicils *B* revoked, one by one, the bequests to the plaintiff of each item of the property representing *A*'s estate, and directed the same to fall into his residuary estate, to which the defendant was to become entitled, and by the testamentary dispositions operative at the death of *B*, who died in 1899, the plaintiff only took Owenbeg. *B* kept accounts and rentals of *A*'s property from 1891 to 1899, separating them from the accounts of his own property. He also wrote out a memorandum stating his reasons for revoking the several bequests of portions of *A*'s property to the plaintiff, from which it appeared that he revoked these dispositions for the purpose of recouping himself or his estate for some loss which he imagined he had sustained by the conduct of the plaintiff and another solicitor whom he had taken into partnership with him. It was proved by an old friend of *B* that he had stated to her that *A* had said to him that he would take care of the plaintiff if he, *B*, would take care of the defendant:—*Held*, by the House of Lords, reversing the decision of the Court of Appeal (*Fitz Gibbon and Walker, L.JJ.*, from whom Lord Ashbourne, C., dissented), and restoring the decision of the Master of the Rolls, that *B* took *A*'s property upon trust to leave it and Owenbeg by will to the plaintiff. *French v. French* - M. R. 172; App. 194; H. L. 224

SET OFF—Banker and customer—Combining accounts - - - - - 439

See BANK.

SETTLED LAND ACTS—Settled land—Tenant for life—Forfeiture clause—Settled Land Act, 1882 (45 & 46 Vict. c. 38) sect. 51.] A testatrix gave to *A B* the use of her house in Dublin during his life as a residence, with a proviso that in the event of *A B* ceasing to reside in it it should form part of her residuary estate. She also gave to *A B* the

SETTLED LAND ACTS—continued.

income of a sum of £10,000 for life, or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence:—*Held*, in the event of a sale of the house by *A B* under the Settled Land Acts, the gift over of the £10,000 was void under the Settled Land Act, 1882, section 51. *In re FitzGerald, deceased; Brereton v. Day* [M. R. 162]

SETTLEMENT — Marriage — Construction —
“Entitled to the lands” - - - 299

See ELDEST SON.

— Marriage — Reformation — “In tail” — Evidence - - - 477, 485

See REFORMATION OF DEED.

— Marriage — Trustees — Purchasers for value
See SUCCESSION DUTY. [109, 111]

SHARES — Company — Winding up — Issue of paid-up shares — Contract with promoter — Registered contract — Consideration — Companies Act, 1867 (30 & 31 Vict. c. 131), sect. 25.] One of the objects for which a company was established was to adopt a contract made between a promoter and the Company, whereby the Company agreed to allot to the promoter 3500 fully paid shares in consideration of an assignment of the benefit of certain options, businesses, and patent rights, and an undertaking to discharge the preliminary expenses of the Company. The agreement was adopted and registered pursuant to sect. 25 of the Companies Act, 1867, and the shares allotted to the promoter and his nominees. The options, businesses, and patent rights were of no value. On the winding up of the Company, the liquidator contended that there was no real consideration for the agreement, and that the allottees were liable to pay the full amount of the shares:—*Held*, that the promoter and his nominees were entitled to hold the shares as fully paid. *Baglan Hall Colliery Company* (L. R. 5 Ch. 350) followed; *Eddystone Marine Company* ([1893] 3 Ch. 9) distinguished. *In re Leinster Corporation, Limited* - - M. R. 349

2. — Sale of — Custom of Stock Exchange — Refusal of Company to register transfer — Action by vendor for specific performance or rescission of contract — Regulation of Company empowering directors to refuse to register purchaser as transferee of shares.] A contract for the sale of shares in a registered company, with unlimited liability, was made through stockbrokers, subject to the Rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him by the vendor of a duly executed transfer, together with the certificate of the shares. One of the regulations of the Company provided that it should be lawful for the directors to decline to register the transfer of shares

SHARES—continued.

to any person not approved of by the directors as transferee, and that thereupon such transfer should be void. An application for registration of the transfer being subsequently made to the directors of the Company by the purchaser, they refused to register him as the transferee of the shares. The vendor issued an equity civil bill, claiming specific performance of the contract, and asking that the purchaser should be ordered to procure the shares to be registered in his own name, or in that of some other person. The civil bill was subsequently amended by adding a prayer for an indemnity and for rescission of the contract; and the County Court Judge made a decree declaring the plaintiff a trustee of the shares for the defendant, and that the defendant was bound to indemnify the plaintiff against calls:—*Held*, by Madden, J., that the inability of the defendant to register the transfer was the non-performance of a condition subsequent binding on the defendant, by reason of which the plaintiff was entitled to treat the contract as at an end; and that the shares should be re-transferred on return of the purchase-money:—*Held*, by the Court of Appeal (Lord Ashbourne, C., and Walker and Holmes, L.JJ., FitzGibbon, L. J., *dissentiente*), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the Company would register the transfer; and that the equity civil bill should have been dismissed. *Casey v. Bentley* MADDEN, J., 376; APP. 383
SHERIFF — Execution — Removal of chattels without regarding landlord's claim for rent—9 Anne, c. 8—Tort—Measure of damages.] Where cattle, exceeding in value one year's rent, were seized in execution by a special bailiff, who, after notice of a claim for rent by the landlord, removed them from the lands without paying a year's rent, and subsequently, after five or six days, returned them to the lands, on the amount of the claim being satisfied:—*Held*, by the Court of Appeal (affirming Ross, J.), that the landlord was entitled to damages, as in an action of tort, which were measured at the amount of the year's rent, of which he had been deprived. *Garde v. Baylor* (unreported) followed. *Wren v. Stokes*

[Ross, J. 167; APP. 171]

SOLICITOR—Taxation of costs - - - 1

See TAXATION OF COSTS.

SOLICITORS' REMUNERATION ACT—

Printed form - - Fee-farm grant - Scale charge - - - - - 1

See TAXATION OF COSTS.

SPECIFIC PERFORMANCE—Sale of Shares

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- 6 Anne (Ir.) c. 2—Registration of deeds 23
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- 9 Anne (Ir.) c. 8—Frauds by tenants 167, 171
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- 8 Vict. c. 18—Lands Clauses Consolidation, s. 80
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- 12 & 13 Vict. c. 105—Renewable Leasehold Conversion - - - 114
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- 13 & 14 Vict. c. 29—Judgment mortgage 514
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- 16 & 17 Vict. c. 51—Succession duty 109, 111
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- 18 & 19 Vict. c. 90—Costs in Crown Proceedings, ss. 1, 2 - - - 63
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- 30 & 31 Vict. c. 131—Companies, s. 25 349
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- 32 & 33 Vict. c. 42—Irish Church, ss. 12, 31, 34 - - - 89
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- 35 & 36 Vict. c. 94—Licensing, s. 31 - 73
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- 37 & 38 Vict. c. 78—Vendors and Purchasers 7
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- 44 & 45 Vict. c. 41—Conveyancing, ss. 42, 43
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- 44 & 45 Vict. c. 44—Solicitors' Remuneration 1
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- 44 & 45 Vict. c. 49—Land Law (Ir.), s. 48 (4)
See FAIR RENT. [139]
- 45 & 46 Vict. c. 38—Settled Land, s. 51 162
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- 52 Vict. c. 7—Customs and Inland Revenue, sect. 12, sub-ss. 1, 2, 3 - 109, 111
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- 53 & 54 Vict. c. 29—Intestates Estates 451
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- 54 & 55 Vict. c. 66—Local Registration of Title, ss. 22, 25, 29 - - - 83
See CONDITIONS OF SALE. 3.
- 56 & 57 Vict. c. 53—Trustees, s. 33 - 99
See SALE.
- 59 & 60 Vict. c. 47—Land Law (Ir.), ss. 5, 7, 11
See SUBLETTING. [410]
- s. 33 (4) - - - 364
See REDEMPTION.

STOCK—continued.

Wicklow and Wexford Railway Company (properly speaking), but she had at the time of her death a sum of £1460 capital stock of the Dublin and Kingstown Railway Company, which was not expressly dealt with by her will. She became entitled to this stock in 1871. In 1856 the Dublin and Kingstown Railway Company had leased all their interest in their railway line to the Dublin, Wicklow and Wexford Railway Company at a rent; and the line from Dublin to Kingstown was managed and worked by the last named Company, forming an integral part of their system of railway communication. It was stated on affidavit that the public did not as a rule distinguish between the two companies, and in previous testamentary documents the testatrix used the two designations interchangeably:—*Held*, that the sum of £1460 capital stock of the Dublin and Kingstown Railway Company passed under the specific bequest to the legatees, and did not fall into the residuary gift contained in the will. Though no verbal or written statement of the intention of a testator is admissible, yet a previous testamentary instrument may be given in evidence to explain an ambiguous or insensible expression in a will. *Flood v. Flood* - - - M. R. 538

STOCK EXCHANGE—Custom—Transfer of shares—Registration - - 376, 383
See SHARES. 2.

SUBLETTING—Landlord and tenant—Land Law (Ireland) Acts, 1881–1896—Subletting without consent—*Bona fide* occupation—Joint tenants or tenants in common—Separate occupation of holding—Land Law (Ireland) Act, 1896, sects. 5, 7, 11.] Four joint tenants, holding under a freehold lease, who were restrained by covenant from subletting, subdivided the holding amongst them. The lease expired in 1895. At this date three of the tenants separately worked and occupied their respective portions of the holding, but the fourth tenant was in occupation of only two acres, having let 153 acres, the entire holding consisting of 355 acres. There was no evidence that the landlord had given consent to the making of the sublettings; there was evidence that, having become aware of their existence, he had made no objection thereto. He received rent from the persons in occupation after the expiration of the lease:—*Held*, that section 11 of the Act of 1896 did not validate the sublettings as against the lessor so as to impute a *bona fide* occupation to the tenant who had sublet, and that therefore, as all the four tenants under the lease were not in separate occupation of their respective separate portions of the holding as joint tenants or tenants in common, the three tenants who were in occupation were not entitled to fix fair rents of the separate portions held by them. *Barton, Landlord; Muldoon, Tenant. Same, Landlord; Coulter,*

STOCK—Will—Construction—Specific legacy—"Stock or shares" in specified railway company—Testatrix possessed of stock in distinct undertaking—Misdescription—Ambiguity—Previous testamentary instrument—Evidence.] A testatrix by her will, dated 2nd January, 1900, bequeathed to certain legatees "all the preference stock or shares in the Dublin, Wicklow and Wexford Railway Company of which I may at the time of my death be possessed." She died in March, 1901. The testatrix never had any stock or shares in the Dublin,

SUBLETTING—*continued.*

Tenant. Same, Landlord; Davis, Tenant

[APP. 410]

SUCCESSION DUTY—*Revenue—Purchaser*

for valuable consideration—Trustees of marriage settlement—Statute of Limitations—16 & 17 Vict.

s. 51, s. 17—The Customs and Inland Revenue Act, 1889 (52 Vict. c. 7, sect. 12, sub-sects. 1, 2, 3.)

In 1857, on the death of *A*, lands became the subject of succession duty. *B*, the successor, died in 1867, having by will, made in 1863, charged the lands with £5000 in favour of *C*. In 1872 *C*, on his marriage, assigned the charge for £5000 to the trustees of his settlement, on the ordinary trusts of a marriage settlement. The lands were afterwards sold at the suit of an incumbrancer, and the Commissioners of Inland Revenue claimed to have the succession duty, which became payable in 1857, satisfied out of the proceeds of the sale in priority to the trustees of the marriage settlement of 1872:—*Held* (affirming the decision of Ross, J.), that the trustees of the marriage settlement were purchasers for valuable consideration within the meaning of sect. 12 of the Customs and Inland Revenue Act, 1889, that as against them the succession duty was barred after the lapse of twelve years, and that they were accordingly entitled to priority over the Inland Revenue Commissioners.

In re Donelan's Estate

[Ross, J. 109; APP. 112]

SUPERIOR INTEREST—*Redemption—Fee-farm rent—Covenant against alienation*

See FEE-FARM GRANT.

[114]

— *Redemption—Tithe rentcharge—Number of years' purchase* - - - 444

See TITHE RENTCHARGE.

SURRENDER—*Clause of—Lease—Basis of value* - - - 433

See COMPULSORY PURCHASE. 1.

TAXATION OF COSTS—*Solicitor and client—Fee-farm grant—Printed form, scale charge—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, 1884—Schedule I., Part 2.]*

A solicitor prepared a series of fee-farm grants, following a printed form previously approved by the grantee, and annexed to the agreement for the grants, adding a recital of the grantor's title, filling in the names of the parties, parcels, rent, &c., and adding a map to each grant:—*Held*, that he was entitled for each conveyance to the remuneration for preparing, settling, and completing conveyances, provided by the scale of charges in Schedule I., Part 2, of the General Order, 1884, under the Solicitors' Remuneration Act, 1881. *In re Aiken; Ex parte Shannon* - - M. R. 1

TENANCY IN COMMON—*Joint tenants—*

Power of advancement—Severance 372,

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TENANT FOR LIFE AND REMAINDER-

MAN—*Deficiency of security—Corpus and income—Apportionment* - 496

See APPORTIONMENT.

— *Mortgage* - - - 299

See ELDEST SON.

— *Payment out of Court—Small amount* 6

See PAYMENT OUT OF COURT.

TITHE RENTCHARGE—*Landlord and tenant*

—Land Purchase Acts—Redemption of superior interest—Improprate tithe rentcharge—Number of years' purchase.] In the absence of special circumstances, twenty years' purchase is reasonable and sufficient for the redemption of impropriate title rentcharge. *In re FitzGerald's Estate*

[MEREDITH, J. 444]

TRANSFER—*Mortgage—Arrears of interest*

See MORTGAGE.

[471]

— *Shares—Refusal of Company to register*

See SHARES. 2.

[376, 383]

TRIAL—*Practice—Trial by jury—Composite action—Issue of fact—Claim for unliquidated damages—Action for account and fraudulent conspiracy.]*

An action having been brought in the Chancery Division against *C. W. S.* for damages for negligence as agent for the plaintiff in the purchase of horses, for fraudulent representation and conspiracy, and also for an account of all profits made by him as such agent, and against five other defendants for damages for conspiracy and an account of all profits made by them, the defendants unsuccessfully applied to transfer the case to the King's Bench Division. The pleadings closed on the 14th June, 1901.

On the 11th December, 1901, the defendants served notice of trial before the Vice-Chancellor with a jury, but the officer of the Court refused to set the action down. On the 14th December, 1901, the plaintiff served notice of trial by the Vice-Chancellor. The defendants applied for an order to set aside the plaintiff's notice of trial as irregular, and that the action should be set down for trial on the defendants' notice, or that the action, or the issues of fact, should be tried by a jury. On appeal from an order of the Vice-Chancellor refusing the application, the plaintiff undertook to strike out the claim against *C. W. S.* for negligence, and the claim for unliquidated damages:—*Held*, that the action thus altered was a Chancery action which should be tried by a judge without a jury. The law and practice as to the right of trial by jury under the Judicature Act considered. *Secretary of State for War v. Studdert* - - - APP 240; H. L. 375

TRUST—*Deficient security—Tenant for life and remainderman* - - - 496

See APPORTIONMENT.

TRUST—*continued.*

— Secret—Arrangement as to disposition of property left by will - 172, 194, 224
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— Whether created—Will—Construction 79,
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TRUSTEE—*Practice—Infant—Appointment of trustees—Beneficial possession of land—Undivided share—Contingency—Form of summons—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sects. 42, 43.]* Under the will of a testator an infant was, in the events that happened, entitled to receive one undivided share in the income of real estate with remainder in an undivided share of the fee-simple of the lands, contingent—(1) on surviving his father, and (2) on attainment of twenty-one or marriage. The trustees of testator's will were directed to pay his share of income to the infant, but had no power of sale of the settled land, or of consenting thereto:—*Held*, that the trustees of the will did not come within the enabling provisions of section 43 of the Conveyancing and Law of Property Act, 1881, and that the Court had power to appoint them trustees for the purpose of section 42 of the Act to enable them in their discretion to apply the share of income, and accumulations thereof, to which the infant was entitled for his benefit. *Tutthill v. Tutthill* - - - M. R. 429

— Marriage Settlement—Purchasers for value
See SUCCESSION DUTY. [109, 111]

VALUATION—Principles of—Court valuers
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— Surrender—Clause of—Compulsory purchase
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VENDOR AND PURCHASER—Conditions of sale—Indemnity against rent—Misleading - - - 7
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— Conditions of sale—Publichouse—Conviction recorded on license—Whether misleading
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VICTORIA, LAW OF—Real estate—Intestates Act - - - 461

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WIFE.

See HUSBAND AND WIFE.

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— Advancement clause—Gift of residue—Tenancy in common - - 372, 467
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— Death unmarried and without issue 333
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— Forfeiture clause—Residence—Sale—Settled Land Acts - - - 162
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— Misdescription—Bequest of Stock - 538
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— Pious or charitable purpose—Perpetuity—Void bequest - - - 342
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WINDING UP—Company—Banker and customer—Set off—Special arrangement
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— Company—Fully paid up shares—Contract with promoter - - - 349
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WORDS—"Die unmarried and without issue"—Will - - - 333
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— "Under the limitations entitled to the lands"—Settlement - - 299
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